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IN THE

Supreme Court of the United States

WORLDCOM, INC.,

Petitioner,

v.

WISCONSIN BELL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Telecommunications Act of 1996 ("Act") aims to open historically monopolized local telephone markets to competition. Sections 251 and 252 of the Act establish a procedure under which incumbent local telephone carriers and competing local carriers attempt to negotiate contracts, known as "interconnection agreements," to establish terms and conditions under which the incumbent carriers will provide services to the competing carriers. If negotiations fail to produce a complete agreement, the Act provides that the governing state regulatory commission may arbitrate any unresolved issues. The completed interconnection agreement is subject to approval by the governing state commission.

The question presented is whether the Act's interconnection agreement procedure is exclusive, and thus preempts state laws that advance the Act's pro-competitive goals by empowering the state regulatory commission to require incumbent carriers to make services available to competing carriers via tariffs.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in this Court are WorldCom, Inc., Wisconsin Bell, Inc., and Ave M. Bie, Robert M. Garvin, and Burneatta Bridge, in their official capacities as Commissioners of the Public Service Commission of Wisconsin.

Pursuant to Supreme Court Rule 29.6, petitioner WorldCom, Inc. states as follows:

WorldCom, Inc. (a publicly-held corporation), through its wholly-owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally. WorldCom, Inc. has no parent corporations. No publicly held company owns 10% or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes S.A. and Digex, Incorporated, both of which issue shares to the public.

WorldCom, Inc. and various of its subsidiaries have filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York. Proceedings regarding WorldCom's petition and the petitions of its subsidiaries are being jointly administered under case number 02-13533-ajg. WorldCom, Inc.'s stock was previously listed on the Nasdaq National Market under the symbols "WCOM" and "MCIT" before WorldCom's bankruptcy filing.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WorldCom, Inc. ("MCI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 340 F.3d 441, and is reprinted at Pet. App. 1a-18a. The opinion of the district court is reprinted at Pet. App. 20a-34a and is not reported. The order of the Public Service Commission of Wisconsin is reprinted at Pet. App. 37a-75a and is not reported.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 12, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276, as well as certain provisions of Wisconsin state statutes. The relevant provisions of the Act are reprinted at Pet. App. 88a-104a. The relevant provisions of Wisconsin state statutes are reprinted at Pet. App. 104a-107a.

STATEMENT OF THE CASE

This petition seeks review of a divided decision of the Seventh Circuit that conflicts with prior decisions of the Sixth and Tenth Circuits, as well as decisions of the Federal Communications Commission ("FCC"). At issue in this case is an order of the Public Service Commission of Wisconsin ("Commission") implementing Wisconsin statutes that require respondent Wisconsin Bell, Inc. ("SBC") to make certain services available to MCI and other competing local carriers in Wisconsin via tariffs. By a 2-1 vote, the Seventh Circuit panel held that such state tariffs were preempted by the provisions of the 1996 Act that allow new entrants such as MCI to invoke a negotiation and arbitration procedure to gain access to elements of the incumbent local carriers' networks.

In so holding, the panel majority acknowledged its disagreement with a prior decision of the Sixth Circuit in

Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., 323 F.3d 348 (6th Cir. 2003), a case involving Michigan affiliates of MCI and SBC. In *Michigan Bell*, the Sixth Circuit held that the 1996 Act did not preempt an order of the Michigan Public Service Commission that allowed MCI's Michigan affiliate to purchase services from SBC's Michigan affiliate via state-law tariff. The Sixth Circuit found that "[u]nder the system of cooperative federalism established by the [1996] Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." *Id.* at 360. The decision below also conflicts with *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), in which the Tenth Circuit held that allowing competing carriers to take services from incumbent carriers' tariffs is not preempted by the negotiation and arbitration provisions of the 1996 Act. *See* 275 F.3d at 1249-51.

The decision below also conflicts with the FCC's order in *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997) ("*Texas Preemption Order*"), in which the FCC held that the 1996 Act did not preempt a state tariff as long as new entrants remained free to invoke the Act's negotiation and arbitration provisions. *Id.* ¶ 138-139.

MCI understands that the Wisconsin Commission will soon file a separate Petition for a Writ of Certiorari in this case. The Wisconsin Commission's decision to seek review in this case underscores that review of the Seventh Circuit's decision is a matter of pressing importance. Whether and to what extent the 1996 Act allows state commissions to utilize state-law tariffs as a means of promoting local telephone competition presents an important question of federal law, with significant consequences for the ultimate success of the Act in achieving Congress's goal of fostering local

competition. By its decision, the Seventh Circuit has eliminated an important tool used by state regulators, both before and after passage of the Act, to ensure that new entrants would gain access to network elements rapidly and on reasonable, clear terms. The divided decision below thus represents a severe intrusion on state regulatory authority and imposes substantial harm to the local competition that Congress sought to encourage.

A. The 1996 Act

The 1996 Act was designed to open historically monopolized local telephone markets and offer consumers the benefits of competition "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 55 ("H.R. Rep."); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). To that end, Congress preempted all state laws restricting local competition, including the exclusive franchises States had historically granted incumbents to provide local service. 47 U.S.C. § 253.

Congress recognized, however, that merely removing legal impediments to entry would not bring about robust competition, at least in the short term. "[B]ecause the investment necessary is so significant," competitors could not quickly replicate the ubiquitous networks that the incumbents had built over decades under a regime funded by captive customers. *See* H.R. Conf. Rep. No. 104-458, at 148 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 160 ("Conf. Rep.").

Congress therefore imposed obligations on incumbent carriers such as SBC that are "intended to facilitate market entry" by competing carriers such as MCI. *AT&T*, 525 U.S.

at 371. "Foremost" among these obligations is the incumbent's obligation to "share its network with competitors." *Id.* Most pertinent here, incumbents must allow new competitors to lease the constituent pieces of the incumbent's network (known as "network elements"), either alone or in combination. *See* 47 U.S.C. § 251(c)(3).

Prices for these network elements are set according to the Total Element Long Run Incremental Cost ("TELRIC") standard established by the FCC. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 497-527, 539 (2002) (affirming FCC's decision to adopt TELRIC pricing standard). TELRIC pricing allows the incumbent carriers to recoup the cost of providing network elements, along with a "reasonable profit." 47 U.S.C. § 252(d)(1); *Verizon Communications*, 535 U.S. at 493.

Along with minimum market-opening requirements, the Act establishes multiple procedures that competing carriers can invoke to implement its substantive requirements. For example, competing carriers can request that incumbents negotiate an "interconnection agreement" to govern the terms under which competing carriers can obtain services from the incumbents. 47 U.S.C. § 252(a)(1). As an incentive to reach voluntary agreement on interconnection terms, the Act allows parties to negotiate provisions "without regard to" many of the Act's substantive requirements. *Id.*

Recognizing that incumbents were unlikely to agree voluntarily to interconnection agreements that threaten their monopolies, Congress gave state commissions the authority to arbitrate all issues not resolved through negotiation. *Id.* § 252(b)(1). Such arbitration may be requested by either the incumbent or the competing carrier 135 days after the initial request for negotiation. *Id.* The resulting interconnection

agreement incorporates all final terms, whether negotiated or arbitrated, and must be submitted to the governing state regulatory commission for approval. *Id.* §§ 252(b)-(c), (e).

When reviewing an interconnection agreement, the state commission may reject any provisions reached through arbitration that are inconsistent with the Act's requirements. *Id.* § 252(e)(2)(B). However, the state commission must approve any provisions in the agreement reached through negotiation, unless the commission finds that the provisions discriminate against other carriers, or that the provisions are inconsistent with the public interest, convenience, and necessity. *Id.* § 252(e)(2)(A). Federal district courts have jurisdiction to review state commission decisions arbitrating and approving the terms of interconnection agreements for compliance with the Act. *Id.* § 252(e)(6).

The negotiation and arbitration mechanisms set forth in the Act are not, however, the sole means for new entrants to get access to network elements. Section 252(i) of the Act, for example, allows competing carriers to take provisions from existing interconnection agreements. *See* 47 U.S.C. § 252(i) (requiring incumbents to make "any interconnection, service, or network element provided under an agreement" available to "any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement").

Competing carriers also can invoke an incumbent's statement of generally available interconnection terms ("SGAT"), if the incumbent carrier has chosen to file an SGAT. *Id.* § 252(f)(1). An SGAT is a statement that an incumbent can file with a state commission setting out "the terms and conditions" that an incumbent "generally offers within that State to comply with the requirements" of the

Act. *Id.* State commissions have authority to review SGATs for compliance with the Act's requirements, and to include additional state-law requirements. *Id.* § 252(f)(2).

In addition to imposing pro-competitive federal obligations on incumbents and establishing these procedures, Congress preserved an independent role for States and state law in fostering local competition. Prior to passage of the Act, several States, including Wisconsin, already had begun implementing pro-competitive initiatives aimed at ending the incumbents' monopolies. *See* 1993 Wis. Act 496 (eff. Sept. 1, 1994).[1] Several of these States sought to open their local markets to competition by requiring incumbents to file tariffs making access to unbundled network elements or services available to potential competing carriers. *Id.*; *see also* n.1, *supra*.

Congress recognized when it passed the Act that such pro-competitive reform was already underway in the States. *See* Senate Rep. No. 104-230, at 5 (1995) ("S. Rep.") (noting that "[s]everal States (such as New York, California, and Illinois) have taken steps to open the local networks of telephone companies"). Congress made clear that it did not intend that the Act displace the States' independent efforts to

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[1] *See also* Mich. Comp. Laws § 484.2357 (1995); Tex. Rev. Civ. Stat. Ann. art. 1446c-0 § 3.453 (West Supp. 1996) (enacted 1995), *recodified at* Tex. Utils. Code Ann. § 60.041 (Vernon 1997); Colo. Rev. Stat. Ann. § 40-15-503 (1995); *Proceeding on Motion of the Commission Regarding Comparably Efficient Interconnection Arrangements for Residential and Business Links*, No. 91-C-1174, 1995 N.Y. PUC LEXIS 710, at *9 (N.Y. Pub. Serv. Comm'n Mar. 1, 1995); *Adoption of Rules on Line-Side Interconnection and Reciprocal Interconnection*, No. 94-0049, 1995 Ill. PUC LEXIS 636, at *15 (Ill. Commerce Comm'n Oct. 3, 1995); *In re Application of MFS Intelenet of Md.*, No. 8584, 1995 Md. PSC LEXIS 261, at *98 (Md. Pub. Serv. Comm'n Dec. 28, 1995).

foster local telephone competition. Rather, as lower courts have recognized, the Act is "an exercise in what has been termed cooperative federalism" between the federal government and the States, *Puerto Rico Tel. Co. v. Telecommunications Reg. Bd.*, 189 F.3d 1, 8 (1st Cir. 1999); *see also Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348, 351 (6th Cir. 2003), "allow[ing] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

Most notably, the Act expressly preserves "any regulation, order, or policy of a State commission" that "establishes access and interconnection obligations of local exchange carriers," so long as the state regulation, order, or policy is "consistent with the requirements of this section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). Section 261 similarly allows States to "impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC]'s regulations to implement this part." *Id.* § 261(c); *see also id.* § 252(e)(3) (allowing state commissions to establish and enforce pro-competitive state-law requirements when arbitrating and reviewing interconnection agreements).

Congress also provided that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided* in such Act or amendments." Act § 601(c), 110 Stat. 56, 143 (1996)

(uncodified note to 47 U.S.C. § 152) (emphasis added). Congress included this clause in the Act in order to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. at 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215. Collectively, these provisions of the Act confirm what the FCC has independently made clear, namely, that Congress did not intend the 1996 Act "to disrupt the pro-competitive actions some states already have taken[.]" *Local Competition Order* ¶ 62.[2]

B. Pro-competitive Provisions in Wisconsin State Law

Wisconsin was one of the States that had enacted provisions aimed at promoting local telephone competition before Congress passed the 1996 Act. Wisconsin law gives the Commission broad authority to order incumbent carriers like SBC to connect their networks with the networks of competing telecommunications providers. Wis. Stat. Ann. §§ 196.04(1)(b)(2), 196.199(2). Incumbent carriers such as SBC are forbidden under Wisconsin law from refusing to interconnect with competing carriers. *Id.* § 196.219(3).

Wisconsin law specifically empowers the Commission to "approve and enforce interconnection agreements" between SBC and competing carriers. *Id.* § 196.199(2)(a). However, Wisconsin law also requires incumbent carriers like SBC to provide certain services to competing carriers by

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[2] *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499 (1996) ("*Local Competition Order*"), *vacated in part on other grounds, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part sub nom. AT&T Corp .v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

filing tariffs. Specifically, Wisconsin law states that incumbent carriers "shall provide access services *under tariff* under the same rates, terms and conditions to all telecommunications providers[.]" *Id.* § 196.219(2m) (emphasis added). "Access service" is defined to include "unbundled local service provided to telecommunications providers." *Id.* § 196.01(1b). Wisconsin law, however, does not provide independent authority for the Commission to "review or set the rates" for access service. *Id.* § 196.196(2)(a).

C. Proceedings Before the Wisconsin Commission

In 1999, the Wisconsin Commission commenced a proceeding to "promote and ensure the development of effective competition in the local exchange telecommunications markets" in Wisconsin. Pet. App. 38a. The Commission required SBC to provide two types of network elements: "UNE-P" and "EELs." UNE-P, or "Unbundled Network Element-Platform," is a combination of several network elements that collectively permit the requesting competing carrier to provide traditional local voice telephone service. Pet. App. 46a. EELs, or "Enhanced Extended Links," are combinations of transport and loop network elements. *Id.*

The Commission found that it had the authority under Wisconsin law to require SBC to offer UNE-P and EELs, and concluded that this authority was not preempted by the 1996 Act. *See* Pet. App. 55a. Instead, in the view of the Commission, the Act preserved the relevant provisions of Wisconsin law as "additional, consistent, pro-competitive state action[.]" Pet. App. 55a-56a.

The Commission also held that, because UNE-P and EELs "qualify as unbundled access" under Wisconsin law, they "must be tariffed by [SBC] pursuant to Wis. Stat. §§ 196.196(2)(a) and 196.219(2m)." Pet. App. 57a. The Commission found that it was necessary to order SBC to provide these services by tariff because, although SBC had purported to offer the services by means of a "voluntary" amendment to its interconnection agreements, "[m]any of the terms and conditions [SBC] has proposed on its 'voluntary' offerings are simply unreasonable or amount to unacceptable overreaching. They either impede the quality or reliability of the offering, or seek to [impose a] throttlehold on [competing carrier] participation in regulatory proceedings." Pet. App. 57a-58a.

The Commission emphasized that, although it was ordering SBC to offer UNE-P and EELs by tariff, it was not eliminating private interconnection agreements or foreclosing reliance on the negotiation and arbitration process presented by the Act. Specifically, the Commission found that, to the extent competing carriers already had interconnection agreements with SBC, the agreements generally remained in effect, and the Order should be treated as "a change of law" under those existing interconnection agreements. Pet. App. 56a-57a. The Commission further noted that "[UNE-P and EELs] can also be sought in new interconnection agreements under §§ 251 and 252." Pet. App. 57a. The Commission also found that its requirement that SBC tariff UNE-P and EELs did not "create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." *Id.*

D. Judicial Proceedings

SBC brought suit in the United States District Court for the Western District of Wisconsin to challenge the Commission's Order. Among other things, SBC contended that the 1996 Act preempts the Commission from requiring SBC to make *any* services – including UNE-P and EELs – available to competing carriers outside of the interconnection agreement process. *See* Pet. App. 27a-28a. The district court agreed with SBC and found that the Act preempts the Commission's Order insofar as the Order requires SBC to make services available via tariff. Pet. App. 33a.

The district court acknowledged that the Wisconsin commission did not purport to make tariffs the exclusive means by which SBC was to offer UNE-P and EELs, and that the Commission in fact had held expressly that SBC could provide the combinations through interconnection agreements, pursuant to 47 U.S.C. §§ 251-252. *See* Pet. App. 22a. The district court found, however, that "[b]y forcing [SBC] to file a tariff that any entrant can select unilaterally without having to negotiate an interconnection agreement, the [C]ommission has imposed a requirement that circumvents the interconnection agreement process prescribed under § 252." Pet. App. 30a.

MCI and the Commission both appealed to the Seventh Circuit. After the completion of briefing and oral argument, the Seventh Circuit initially directed the parties to submit supplemental briefs addressing what pricing standard would be applied to the UNE-P and EELs tariffs SBC had been required to file. Pet. App. 4a. All parties agreed that the prices for SBC's UNE-P and EELs tariffs would be determined according to the TELRIC methodology – the

same methodology that would be applied by the Commission in arbitrating interconnection agreements under the Act. *Id.*

Thereafter, by a 2-1 vote, the panel affirmed the district court's decision. Acknowledging its disagreement with the Sixth Circuit's decision in *Michigan Bell*, the majority held that Wisconsin's tariffing requirement is preempted because it "interfere[s] with the procedures established by the federal act." Pet. App. 6a.

The "interference" that troubled the majority took several forms. First, even though the TELRIC pricing methodology to be used in the tariffs is the same that the Wisconsin Commission would use in an arbitration, the majority found that the tariff requirement "places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there." *Id.*

The majority also found that the tariff requirement "complicates the contractual route by authorizing a parallel proceeding." *Id.* The majority believed that the "tariff procedure shortcircuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." Pet. App. 7a.

The majority also concluded that requiring SBC to provide services via tariff could complicate the Act's scheme of federal judicial review of state commission decisions. It believed that "[a]n appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court," and found this to be "a difference that cannot be assumed to be inconsequential."

Pet. App. 6a. It concluded that the "negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." Pet. App. 7a.

The majority acknowledged that, as MCI and the Commission argued, "by providing an alternative means of obtaining interconnection, the state's tariff requirement promotes the procompetitive policy of the federal act." Pet. App. 7a. However, the majority pronounced this a "dangerous method of [statutory] interpretation." *Id.* Without referencing any provision in the Act or its legislative history, the majority speculated that this argument would "run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place." *Id.*

Judge Cudahy dissented. He first observed that "the Act makes clear that state regulatory processes are not to be voided unless they can be shown to conflict with federal purposes." Pet. App. 8a. Citing the Act's multiple provisions preserving pro-competitive state law, *see supra*, pp. 8-9, Judge Cudahy noted that "the whole idea that the *method* of negotiation/arbitration is exclusive and preempted has no sound legal basis" because "the Act here does not exclude, but rather specifically embraces, such parallel regulation." Pet. App. 11a (emphasis in original).

In response to the majority's "thumb on the scales" argument, Judge Cudahy observed that the state commission would use the same TELRIC methodology to set prices whether it did so in an arbitration under § 252, or in the

tariff. Therefore, "the § 252 mechanism already contemplates a very similar 'thumb' inherent in its negotiation/arbitration method of interconnection." Pet. App. 12a.

Judge Cudahy also refuted the majority's claim that "a tariffing challenge would go to state court." Pet. App. 13a. He noted that this Court has held that federal district courts have jurisdiction, pursuant to 28 U.S.C. § 1331, over claims that state commissions have violated federal law in decisions other than decisions approving interconnection agreements. *Id.* (citing *Verizon Md. v. Public Serv. Comm'n*, 535 U.S. 635 (2002)). Thus, "insofar as the challenge would concern the state's application of the TELRIC standard in evaluating a tariff, it is likely that the federal courts would have jurisdiction over the matter, just as they would over a challenge to an arbitrated interconnection agreement." Pet. App. 13a-14a.

Judge Cudahy also pointed out that, because SBC's challenge to the tariff requirement was not based on the particular terms of the tariff, but rather on a claim that SBC can *never* be required to make services available via tariff, "what is involved here is simply a facial challenge to the [Commission's] ability to require tariffing under any circumstances. . . . Speculation about possible terms is, therefore, beside the point in this facial challenge. . . the only issue is whether there is any set of facts under which the [Commission] can require tariffing." Pet. App. 15a-16a.

Judge Cudahy also dismissed as "unsupported by the statute" the majority's suggestion that a "careful compromise of interest group positions" intended to afford "protections" to SBC. Pet. App. 14a. Finally, Judge Cudahy concluded that the majority erred by "look[ing] upon the negotiation

phase as providing a purely 'free market' solution as opposed to a regulatory solution." Pet. App. 15a. In Judge Cudahy's view, "this dichotomy simply does not exist here, where all parties are bound to the TELRIC method of rate determination." Pet. App. 15a.

In the end, Judge Cudahy concluded that "[w]hen one strips away the tangential distractions, the majority has ruled that Congress intended there to be only one method to achieve interconnection and establish its terms. The Act does not support this conclusion." Pet. App. 18a.

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether the negotiation and arbitration procedure created by the 1996 Act preempts state laws that utilize tariffing requirements as an additional procedural means to promote local telephone competition. By sustaining SBC's "facial" challenge to the state-law tariffing requirement in this case, the Seventh Circuit's decision has created a clear split among the circuits on this issue. The Seventh Circuit panel majority believed that Congress intended the interconnection agreement process to be the only procedure that States can employ to promote local competition. Pet. App. 5a-7a. It therefore found that the 1996 Act preempts Wisconsin's effort to "create an alternative method by which a competitor can obtain interconnection rights." Pet. App. 2a.

The Sixth Circuit reached precisely the opposite conclusion in *Michigan Bell*. The Sixth Circuit held that, "[u]nder the system of cooperative federalism established by the Act, it is permissible for [states] to maintain a tariff system alongside the agreements negotiated under the Act." 323 F.3d at 360. It found that "the negotiation procedure

under Section 252 of the Act is not the only way for the [state] Commission to order and regulate telecommunications." *Id.* at 359.

The Seventh Circuit's decision also conflicts with a prior decision of the Tenth Circuit, which held that the Act does not preempt state commissions from requiring incumbents to include provisions in interconnection agreements allowing competing carriers to "opt in" to the incumbents' tariffs. *U.S. West Communications*, 275 F.3d at 1248-51.

The majority's decision below also conflicts with the FCC's *Texas Preemption Order,* which found that the Act did not preempt a Texas tariff. Although both Judge Cudahy below and the Sixth Circuit in *Michigan Bell* expressly relied on that FCC decision, the majority entirely ignored the decision in its opinion.

Moreover, the Seventh Circuit's decision is incorrect. The panel majority misinterpreted the language of, and the policies underlying, the Act. As the Sixth Circuit (and Judge Cudahy) recognized, the Act provides no textual support for the conclusion that Congress intended the interconnection agreement process to preempt pro-competitive state-law tariffing requirements, even those that facilitate new entry into local markets. To the contrary, the numerous provisions in the Act that specifically preserve pro-competitive state law suggest just the opposite. The Act's legislative history also provides no support for the Seventh Circuit's belief that Congress intended to preempt pro-competitive state laws simply because those laws utilize tariffs as an additional means of fostering local competition.

Review of the Seventh Circuit's decision is urgently needed. Pursuant to state laws intended to advance local competition, numerous state commissions have required incumbent carriers to make services available to competing carriers through tariffs. As demonstrated by the fact that the Public Service Commission of Wisconsin will be filing its own Petition, the Seventh Circuit decision to eliminate tariffs as a viable option not only creates a substantial and unwarranted intrusion on state regulatory authority, it imposes substantial harm to the competitive process by denying state regulators the ability to provide rapid access on predictable and reasonable terms, as state tariffs would otherwise allow. The Seventh Circuit's decision also encourages incumbents to delay negotiations in an effort to forestall the competition that Congress sought to ensure "as quickly as possible." H.R. Rep. at 89, *reprinted in* 1996 U.S.C.C.A.N. 10, 55.

Moreover, by creating a division among the Circuits, the Seventh Circuit has introduced more confusion and uncertainty into a system that has had more than its fair share of both. In many States (including Wisconsin), MCI's interconnection agreements with incumbent carriers specifically reference or incorporate those tariffs. The decision of the Seventh Circuit majority would eviscerate these critical provisions, fundamentally reworking existing interconnection agreements, and leaving carriers such as MCI that operate nationwide in the dark about the validity of tariff-incorporating provisions.

As this Court has recognized, the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars," *AT&T*, 525 U.S. at 397, and "fundamentally restructures local telephone markets," *id.* at 371. The Court should exercise its authority to restore

needed clarity to this important question regarding preemption of state regulatory authority under the 1996 Act and the role of state-law tariffs in promoting local telephone competition, and eliminate the anticompetitive incentives that the Seventh Circuit's decision has created.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THE SIXTH AND TENTH CIRCUITS, AS WELL AS THE FCC.

The Seventh Circuit's decision conflicts with the Sixth Circuit's decision in *Michigan Bell*. The Seventh Circuit majority found that requiring SBC to make services available via tariff "*has* to interfere with the procedures established by the federal act." Pet. App. 6a (emphasis in original). It found that the requirement places a "thumb on the scales" by requiring SBC to state its "reservation price" in the tariff, "so that bargaining begins from there. *Id.* The majority thus concluded that the tariffing requirement "enable[s] would-be entrants to bypass the federally ordained procedure." Pet. App. 7a.

By contrast, the Sixth Circuit held in *Michigan Bell* that the Act "recognizes that interconnection agreements are not the sole way to promote competition among local service providers, for it allows room for state regulation," and that "[t]he negotiation procedure under Section 252 of the Act is not the only way for the [state] Commission to order and regulate telecommunications." 323 F.3d at 359.

The Sixth Circuit reasoned that "Michigan's tariffs and the agreements negotiated pursuant to the Act work toward the common purpose of giving competing carriers a means of competing with incumbent local exchange carriers." *Id.* It

found that "allowing MCI to purchase under terms of [SBC's] tariffs will ensure that competitors are able to buy on the most favorable terms available in a given market." *Id.* It further found that, "[u]nder the system of cooperative federalism established by the Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." *Id.* at 360. The Sixth Circuit concluded that, so long as "the interconnection agreement [between MCI and SBC] did not preclude MCI's placing . . . orders under [SBC's] tariff obligations," the Act does not preempt MCI's ability to order services from SBC's tariffs. *Id.* at 359. The Sixth Circuit's conclusion that state tariffs of this sort can comfortably coexist with the negotiation and arbitration procedure in the Act is flatly inconsistent with the Seventh Circuit's view that the two schemes are incompatible.[3]

The Seventh Circuit's decision also conflicts with the Tenth Circuit's decision in *U.S. West Communications*. In

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[3] In a prior case, the Sixth Circuit held that a state commission could not establish tariffing obligations that allow competing carriers to bypass completely the "entire interconnection process (with its attendant negotiation/arbitration, state commission approval, FCC oversight, and federal court review procedures)." *Verizon North, Inc. v Strand*, 309 F.3d 935 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1649 (2003). In *Michigan Bell*, the Sixth Circuit held that the preemption analysis from *Verizon North* applied only in situations in which the state tariff would allow parties to bypass the entire interconnection agreement process altogether. *Michigan Bell*, 323 F.3d at 360. The preemption analysis from *Verizon North* is inapplicable in this context, because the Commission specifically found that the tariffs did "not create a complete regime" of interconnection that would allow carriers to "bypass" the § 252 process. Pet. App. 57a. Notably, SBC's Michigan affiliate filed a petition for rehearing *en banc* in *Michigan Bell*, in which it argued that the decision was inconsistent with *Verizon North*, but the Sixth Circuit denied that petition.

that case, the Tenth Circuit held that, when conducting an arbitration under the Act, a state commission may order an incumbent carrier to include provisions in an interconnection agreement that allow the competing carrier to take services from the incumbent carrier's tariffs. *See* 275 F.3d at 1250-51. Like the Seventh Circuit in this case, the district court in *U.S. West Communications* concluded that allowing the competing carrier to take services from the incumbent's tariff could "negatively impact the negotiation of interconnection agreements" because it would leave "little incentive for carriers to negotiate if they can simply opt in to a more favorable tariff than the state commission imposes." *Id.* at 1250 (quoting district court).

The Tenth Circuit disagreed. It found that, "[a]t least from the standpoint of a [competing carrier], an incentive remains to negotiate prices and terms that are more favorable than those set forth in an [incumbent's] existing tariffs[.]" *Id.* The Tenth Circuit further found that "[t]he tariff opt-in provision therefore does not diminish the negotiation process." *Id.*; *see also id.* (concluding that the tariff opt-in provision "ensures that a [competing carrier] will be able to obtain the most favorable prices and terms available, thereby allowing it to remain competitive in the local marketplace"). The Tenth Circuit thus expressly rejected the rationale that the Seventh Circuit majority adopted, namely, that allowing competing carriers to take services from tariffs places an impermissible "thumb on the scales" in the negotiation process and undermines "the contractual route" to reaching agreement contemplated by the Act. Pet. App. 6a.

The Seventh Circuit's decision also conflicts with the FCC's interpretation of the Act. In the *Texas Preemption Order*, the FCC was asked to preempt requirements imposed by the Public Utility Commission of Texas (the "Texas

PUC") that required SBC's affiliate Southwestern Bell to make its services available for resale via tariff. *Texas Preemption Order* ¶ 191; Tex. Rev. Civ. Ann. art. 1446c-0 § 3.453 (West Supp. 1996).

One challenged provision allowed certain competing carriers to purchase local service for resale from Southwestern Bell's tariff at a five percent discount from Southwestern Bell's retail rate – far less than the discount rate the Act requires. *Texas Preemption Order* ¶¶ 131, 133. The Texas PUC argued that federal law did not preempt the provision because "[t]he five percent discount tariff operates on a 'parallel track' with [the Act] and provides an optional, alternative procedure for competitors to obtain local exchange services for resale. The state tariff does not supersede or negate the federal provisions." *Id.* ¶ 132 (alterations in original).

The FCC agreed and declined to preempt the Texas statute. The FCC found that "there is nothing in [the Texas statute] that prohibits [competing carriers] from seeking to obtain flat rated local exchange services for resale from [Southwestern Bell] pursuant to the negotiation and arbitration provisions contained in sections 251 and 252 of the Act." *Id.* ¶ 138. The Texas statute merely "provides an *optional* resale avenue that does not interfere with the ability of [carriers] to invoke sections 251 and 252 of the Act." *Id.* ¶ 139 (emphasis added).

Notably, the FCC acknowledged the principle relied on by the Seventh Circuit that conflict preemption exists when a state statute "'interferes with the methods by which the federal statute was designed to reach [its] goal.'" *Id.* ¶ 50 (*citing Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992)). The FCC correctly concluded,

however, that this principle does not apply to state tariffing regulation, so long as the state law does not interfere with competing carriers' ability to invoke the Act's procedures. *Id.* ¶ 15 (finding that the Texas statute "presents an option that [competing carriers] may elect under state law, but in no way interferes with a carrier's ability to invoke the negotiation and arbitration procedures in the [Act]").

II. THE SEVENTH CIRCUIT IS INCORRECT.

The Seventh Circuit's conclusion that the Act preempts state-law tariffing requirements is incorrect for several reasons.

First, there is no textual support for a claim that the Act preempts state-law tariffing requirements; indeed the text refutes any such claim. Section 251(d)(3) of the Act specifically preserves any "regulation, order, or policy of a State commission that . . . establishes access and interconnection obligations of local exchange carriers" so long as the obligations are "consistent with" and do not "substantially prevent implementation of the requirements" or the "purposes" of the Act. 47 U.S.C. § 251(d)(3). This describes the Commission's Order almost exactly – it is a state "regulation, order, or policy" that "establishes access and interconnection obligations for local exchange carriers." Because the Commission's Order does not purport to displace the interconnection agreement process, it is "consistent with" and does not in any way "prevent implementation" of the requirements or the purposes of the Act.

The Act's other non-preemption provisions confirm the Seventh Circuit's error. By including Section 261 and Section 601(c) in the Act, Congress provided unambiguous

direction to *avoid* precisely the expansive implied preemption analysis used by the Seventh Circuit majority here.

Second, the Seventh Circuit was wrong to conclude that the existence of the tariff would "interfere with the procedures established by the federal Act," by "requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price." Pet. App. 6a. As Judge Cudahy correctly recognized, the existence of the tariff does not "somehow bludgeon [SBC] into revealing negotiating secrets, like reservation price, that it would otherwise be able to protect, or into otherwise bargaining from an inferior position." Pet. App. 13a. Under the FCC's regulations, for example, SBC is *required*, when negotiating an interconnection agreement with a competing carrier, to provide the competing carrier with "cost data that would be relevant to setting rates if the parties were in arbitration." 47 C.F.R. § 51.301(c)(8)(ii) (2003). Thus, as a practical matter, requiring SBC to file a tariff containing the TELRIC price does not give competing carriers any more information about SBC's "reservation price" than they are already entitled to receive under federal law. Moreover, under the Act, any entrant who is unhappy with the bargaining process can simply ask the Commission to arbitrate, thereby invoking "a procedure virtually identical to what is going on unilaterally during the tariffing process at issue." Pet. App. 13a. It is not surprising, therefore, that SBC never made this "reservation price" argument to the Seventh Circuit – that court (erroneously) spun it from whole cloth.

More broadly, the majority's concerns about "reservation price" and the incumbent's bargaining position fundamentally misconceive the nature of this negotiation

process. As the FCC recognized, "the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and thus little to offer the incumbent in a negotiation." *Local Competition Order* ¶ 134. Negotiations under the 1996 Act occur against a backdrop of detailed federal and state regulatory requirements, the most important of which for present purposes is TELRIC. *See* 47 C.F.R. § 51.505 (2003). Because state commissions must set prices for network elements according to the TELRIC methodology, *see id.*, incumbents and new entrants both know in advance how those prices will be determined if they do not reach agreement during the negotiation process. The majority was thus wrong, as Judge Cudahy recognized, to view the negotiation phase as providing "a purely 'free market' solution'" for setting prices that would be disrupted by the State's provision of a "regulatory solution."

Third, the history and purpose of the Act do not support the Seventh Circuit's decision. Congress was fully aware when it passed the Act that several States had already passed state-specific laws aimed at opening local markets to competition, *see* S. Rep. at 5 (noting that "[s]everal States (such as New York, California, and Illinois) have taken steps to open the local networks of telephone companies"), and Congress expressly sought to build on these existing state efforts. If Congress had intended to preempt those state laws, it could have done so expressly, as it did with respect to state laws that restrict competition. *See* 47 U.S.C. § 253. Instead, Congress not only enacted the provisions preserving state law described above, it made clear that those provisions were intended to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." Conf. Rep. at 201, *reprinted in* 1996 U.S.C.C.A.N. 124, 215.

Fourth, no rationale underlying the Act supports the Seventh Circuit's decision to accept SBC's "facial" challenge to the tariff. As Judge Cudahy recognized, because SBC challenged the requirement that it file a tariff in the first place (as opposed to the right of any particular competing carrier to access the tariff), "the only issue is whether there is any set of facts under which the [Commission] can require tariffing." Pet. App. 16a; *see California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (finding that a "facial challenge" to an agency's authority can be sustained only if "there is no possible set of conditions" under which the agency can exercise its authority). To defeat such a facial challenge, there need merely be "a possible set" of conditions under which the agency can exercise its authority in a way that is "not in conflict with federal law." *California Coastal*, 480 U.S. at 593.

Such a facial challenge to a state commission's authority to require tariffs clearly fails under the Act. As the Sixth Circuit and the FCC have recognized, whether competing carriers may take services from incumbent carriers' tariffs should not be determined by a *per se* rule against the use of tariffs, but rather by the terms of the parties' interconnection agreements. *See In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 ¶ 602 n.2001 (2002) ("*FCC Arbitration Order*") ("We expect that whether a party may purchase a service out of a tariff when it is also offered in the interconnection agreement would depend on the language of the agreement."); *Michigan Bell*, 323 F.3d at 359 (holding that MCI may order services from SBC's tariffs so long as "the interconnection agreement [between MCI and SBC] did not preclude MCI's placing . . . orders under [SBC's] tariff obligations").

The Act allows parties to negotiate terms in interconnection agreements "without regard" to most of the Act's requirements. 47 U.S.C. § 252(a)(1). Thus, as the FCC found, "[c]onsistent with the [Act's] recognition of the parties' right to negotiate interconnection agreements, the parties are certainly free to agree that services will be provided pursuant to tariffs filed with the appropriate commission." *FCC Arbitration Order* ¶ 602. The Seventh Circuit committed a fundamental error by accepting SBC's facial challenge to the Commission's Order, and finding the tariffing requirement preempted, irrespective of the terms of any interconnection agreements.

Fifth, the Seventh Circuit's professed belief that "[a]n appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court," is wrong. Pet. App. 6a. This Court recently held that federal court jurisdiction to hear claims that state commission decisions violate the Act is not limited to decisions arbitrating and approving interconnection agreements. *Verizon Maryland v. Public Serv. Comm'n*, 535 U.S. 635, 641-44 (2002). Thus, as Judge Cudahy noted, "at the end of either process, negotiation/arbitration or tariffing, an aggrieved [SBC] can challenge the result in federal court." Pet. App. 13a.

Finally, the Seventh Circuit all but ignored the presumption that federal statutes leave in place state regulatory authority to the extent possible. The Seventh Circuit's error is particularly pronounced in this case, where the actions of the Wisconsin Commission fall within the boundaries of traditional state regulatory authority, and where Congress was explicitly trying to build on, not

eradicate, existing state efforts to introduce competition into these markets.

III. REVIEW IS URGENTLY NEEDED BECAUSE THE SEVENTH CIRCUIT'S DECISION, IF LEFT UNDISTURBED, WILL FACILITATE INCUMBENT EFFORTS TO DELAY NEW ENTRY AND UNDERMINE THE MARKET-OPENING ROLE THAT CONGRESS LEFT FOR STATE LAW.

The dispute presented by this Petition is not merely theoretical. The decision below directly and substantially impairs the ability of MCI and other competing carriers to operate their businesses and fulfill the congressional goal of competition in local telephone markets. It does so by restricting the ability of state regulators to remove the single biggest obstacle to new entry, namely, delay and intransigence on the part of local incumbents.

As many state regulatory authorities have concluded, tariffs are often an effective tool to promote competition precisely because they limit delay. The Seventh Circuit's decision nullifies this important regulatory mechanism. As a result of that decision, every incumbent has an incentive to force the long, nine-month process of negotiation and arbitration (followed by further delay for appellate review) on every interconnection request that differs even slightly from a pre-existing contract. Those time delays are unnecessary in many (if not most) cases, and they severely restrict the ability of new entrants to compete.

The present case illustrates the potential for abuse. As the Wisconsin Commission noted in its order, SBC proposed a "voluntary" amendment to its interconnection agreements,

purportedly to make UNE-P and EELs available to new entrants, as required. Pet. App. 57a-58a. The Commission found, however, that "many of the terms and conditions [SBC] has proposed in its 'voluntary' offerings are simply unreasonable or amount to unacceptable overreaching. They either impede the quality or reliability of the offering, or seek to [impose a] throttlehold on [new entrants'] participation in regulatory proceedings." *Id.* Forcing new entrants to negotiate with SBC to eliminate these unreasonable terms and conditions would directly impede their entry and would delay the onset of local competition. By contrast, by ordering SBC to provide UNE-P and EELs to all new entrants via tariff, the Commission made these services available more quickly to all entrants, without requiring lengthy negotiations just to get what the law requires.

By eliminating the ability of state regulators to use tariffs in this manner to supplement the procedures provided by the 1996 Act and guard against incumbent intransigence, the Seventh Circuit threatens to undo state efforts to foster competition and to reward exactly the sort of resistance that Congress hoped to forestall.

The Seventh Circuit's decision is also tremendously destabilizing, particularly in light of the conflicting decisions of the Sixth and Tenth Circuits. MCI, for example, is a party to interconnection agreements around the country that, either expressly or by implication, allow MCI to obtain services via the incumbents' state-law tariffs. These include MCI's interconnection agreement with SBC in Wisconsin. Yet under the Seventh Circuit's ruling, the enforceability of these provisions is, at a minimum, open to doubt.

Moreover, the confusion caused by the decision below is not limited to the enforceability of existing contracts. MCI

routinely arbitrates new interconnection agreements with incumbent carriers around the country in which the incumbents, either voluntarily or through arbitration, provide services via tariff. *See, e.g., FCC Arbitration Order* ¶ 602 (describing agreement between the parties that certain services "will be provided pursuant to tariffs filed with the appropriate commission"). But the Seventh Circuit's decision creates confusion about the enforceability of even these freely-negotiated provisions. Allowing such uncertainty over the rules of local competition to continue is antithetical to Congress' goal of stimulating competition "as quickly as possible." H.R. Rep. at 89, *reprinted in* 1996 U.S.C.C.A.N. 10, 55.

Finally, clarification from this Court is needed to avoid years of piecemeal litigation over the many state laws and state commission orders that require incumbent carriers to make services available by tariff. As noted above, many States have enacted laws similar to Wisconsin's that require incumbents to publish tariffs. *See supra,* p. 7 and n.1. Using the Seventh Circuit's decision as a guide, incumbents are sure to bring challenges to these statutes and commission orders around the country. Clarification by this Court now will avoid years of uncertain and confusing litigation over this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, PLAINTIFF-APPELLEE, v. AVE M. BIE, et al., COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS-APPELLANTS, AND WORLDCOM, INC., INTERVENING DEFENDANT APPELLANT.

No. 02-3854 & No. 02-3897

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

340 F.3d 441

April 14, 2003, Argued
August 12, 2003, Decided

Before CUDAHY, POSNER and EASTERBROOK, Circuit Judges.

Opinion for the Court filed by Circuit Judge POSNER.
Dissenting opinion filed by Circuit Judge CUDAHY.

POSNER, *Circuit Judge*. Local telephone companies such as Wisconsin Bell have a degree of monopoly power because of the cost to a competitor of duplicating the grid of telephone wires and switching equipment that constitutes a local telephone network. The competitor will find it difficult to compete unless it is interconnected with the local network. The Telecommunications Act of 1996 provides a machinery for encouraging interconnection. The competitor can require the local phone company to negotiate, in good faith, an

agreement authorizing interconnection on mutually agreeable terms. If negotiations fail, the competitor can seek arbitration by the state regulatory commission, and the commission's arbitral decision can be challenged in federal district court on the ground that the decision fails to comply with 47 U.S.C. §§ 251 or 252, sections that establish pricing and other standards for interconnection. See *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 492-97 (2002). But the commission's decision cannot be challenged in state court. 47 U.S.C. §§ 252(e)(4), (6).

The question presented by this appeal is whether a state may create an alternative method by which a competitor can obtain interconnection rights. Wisconsin's public utility commission simply ordered Wisconsin Bell to file tariffs setting forth the price and other terms on which competitors such as WorldCom shall be entitled to interconnect with Wisconsin Bell's local telephone network, rather than arbitrating a disagreement between WorldCom and its competitors concerning the terms on which those competitors could interconnect with Wisconsin Bell's local network. Wisconsin Bell challenged the order in federal district court. The judge held that the order is barred by the federal act, and these appeals (by the commission itself, and by WorldCom) followed.

Whether as the district judge ruled the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure. The Federal Telecommunications Act is explicit that a state commission's regulations concerning interconnection are not preempted "if such regulations are not inconsistent with the provisions of [the Federal Telecommunications Act]." 47 U.S.C. § 261(b); *Verizon*

North, Inc. v. Strand, 309 F.3d 935, 937-44 (6th Cir. 2002). But if they are inconsistent, they are preempted. A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law, see, e.g., *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103-04 and n. 2 (1992) – and so WorldCom acknowledges in its reply brief.

There is an initial question, however, whether the state's tariff order has any practical significance. Wisconsin disclaims authority to fix the rates in the tariffs that it has ordered Wisconsin Bell to file. If taken literally, the disclaimer implies that if Wisconsin Bell wants to prevent WorldCom or other would-be competitors from bypassing the contractual route, and thus to thwart uttterly the state commission's alternative procedure, it has only to specify a ridiculously high price in the tariffs that it files. But against this the Wisconsin commission, while disclaiming authority to fix the rates in Wisconsin Bell's interconnection tariffs, asserts a right to insist that the rates be "reasonable." [T]he commission may not, and is not, specifying the tariff rates, terms, and conditions .... However, compliance with this order for tariffing does require good faith on the part of Ameritech; it cannot post a price, or impose terms and conditions, so totally unreasonable as to amount to a de facto avoidance of compliance. An unreasonable price, term, or condition is one that is patently obvious to any reasonably well-informed buyer as intended to discourage or prevent the purchase of the service. Having said that, however, the Commission recognizes that, in any challenge to a price, term or condition, the proponent would have a heavy burden to prove Ameritech's noncompliance with this order." *Final Decision*, Investigation into Ameritech Wisconsin

Operational Support Systems, Docket No. 6720-TI-160, at 20, available at http://psc.wi.gov/pdffiles/ord_notc/3823.pdf (Public Service Commission of Wisconsin Sept. 25, 2001).

In the usual type of common carrier or public utility regulation, the reasonableness of a rate is determined by reference to the cost of the tariffed service; the carrier or utility is constrained to fix a rate no higher than necessary to cover the cost of the service. The passage we just quoted from the Commission's decision suggests that only an outlandish discrepancy between the tariffed rate and the cost of service will trigger a finding of unreasonableness. This implies that Wisconsin Bell's pricing freedom is constrained only to the extent that it may not fix a rate that exceeds the upper end of the range of prices likely to emerge from a negotiation with a would-be competitor in accordance with the procedures set forth in the federal act. The tariffing requirement would still be pretty empty because the would-be competitor would expect to be able to do better in a negotiation subject to arbitration than merely to bow to the telephone company's opening bid.

We were led by these ruminations to direct the parties to file supplemental briefs explaining just what is at stake in this case. We learn from these briefs that while indeed disclaiming power to fix Wisconsin Bell's rates, the Wisconsin commission has ruled that the rates in the tariffs that it has required Wisconsin Bell to file must be based on the cost of the tariffed services as determined in accordance with cost-accounting procedures prescribed by the commission; specifically, the rates must be based on "the sum of the Total Element Long Run Incremental Cost (TELRIC) and a reasonable allocation of forward-looking joint and common costs." *Final Decision*, Investigation into Ameritech Wisconsin's Unbundled Network Elements,

Docket No. 6720-TI-161, at 22-23, available at http://psc.wi.gov/pdffiles/ord_ notc/4534.PDF (Public Service Commission of Wisconsin Mar. 22, 2002). Rates so determined will prevent Wisconsin Bell from setting a "take it or leave it" rate that might deter all prospective entrants from taking the tariff route. "As explained in the *Final Decision*, this order does not establish [the tariff rates] themselves, but determines the details of a methodology that can be used to determine cost-based [tariffs] as required. For example, the Commission made the determinations in its *Final Decision* for the appropriate cost of capital, depreciation rates, level of spare capacity (fill), contract prices and joint and common markup to comply with forward-looking TELRIC pricing standards to name a few such details." *UNE Compliance Order*, Investigation into Ameritech Wisconsin's Unbundled Network Elements, Docket No. 6720-TI-161, at 61, available at http://psc.wi.gov/pdffiles/ord_notc/6145.PDF (Public Service Commission of Wisconsin July 9, 2003). These decisions make clear that it is the commission, not Wisconsin Bell, that is making the tariff in a realistic sense. The statement by our dissenting colleague that the decisions from which we have quoted do not concern the tariffs that the Commission has ordered Wisconsin Bell to file is incorrect. The decisions expressly direct Wisconsin Bell to file conforming tariffs on unbundled network elements (UNE), March 22 order, *supra*, at 2, which are a component of operational support systems (OSS), the general term for the provision of access by a local phone company to a new entrant. Sept. 25 order, *supra*, at 1 n.1.

The district court was right to hold that the state's tariffing requirement is preempted. See *Verizon North, Inc. v. Strand, supra*, 309 F.3d at 941; *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D.

Ore. 1999); but cf. *Michigan Bell Tel. Co. v. MCI Metro Access Transmission Services, Inc.*, 323 F.3d 348, 358-60 (6th Cir. 2003). The requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there. And it allows the other party to challenge the reservation price, and try to get it lowered, by challenging the tariff before the state regulatory commission, with further appeal possible to a state court — even though Congress, in setting up the negotiation procedure, explicitly excluded the state courts from getting involved in it. At the very least, the tariff requirement complicates the contractual route by authorizing a parallel proceeding.

It is true that the arbitral procedure prescribed by the federal act is not completely freewheeling. The state commission is required, in the event the parties cannot come to an agreement, to establish terms of interconnection based on the same TELRIC pricing standard that the commission would apply to a tariff challenge. *Verizon Communications, Inc. v. FCC, supra*, 535 U.S. at 493-97. But it does not follow that the tariff route and the negotiation route are the same or have the same effects. An appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court, a difference that cannot be assumed to be inconsequential. And given the vagaries of the regulatory process, which requires such stabs in the dark as making "reasonable projections" of the use that a prospective entrant will make of access to the local network if interconnection is ordered, *id.* at 496 n.16, and the fact, as the Court noted in the case, that in setting rates the state commissions are subject to an

"important limitation previously unknown to utility regulation," *id.* at 493, the results of a negotiation between the local phone company and a prospective entrant are not preordained — if it were, the federal law would not have made recourse to the commission a last resort if negotiations fail. The tariff procedure shortcircuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement. 47 U.S.C. § 253(b)(1).

The commission and WorldCom argue that by providing an alternative means of obtaining interconnection, the state's tariff requirement promotes the procompetitive policy of the federal act. But to identify the policy underlying a statute and then run with it is a dangerous method of interpretation; it is likely to run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam); *Hrubec v. National Railroad Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995); *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1309 (7th Cir. 1983); Philip P. Frickey, "From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation," 77 *Minn. L.Rev.* 241, 251 (1992). The negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure.

AFFIRMED.

CUDAHY, *Circuit Judge*, dissenting. The starting point for the present analysis must be the strong presumption against preemption of state law, especially in the area of local telephone service where, until the passage of the Telecommunications Act of 1996 (the Act or FTA), Pub.L. No. 104-104, 110 Stat. 56, the states had historically exercised an *exclusive* jurisdiction. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355 (1986). No doubt the FTA prescribes a specific, but I believe non-exclusive, process for determination of prices to be charged by incumbent carriers to aspiring competitors. But the Act makes clear that state regulatory processes are not to be voided unless they can be shown to conflict with federal purposes. In fact, as the majority notes, the FTA clearly addresses the issue of preemption as follows:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

47 U.S.C. § 261(b). Plus, the Act has a more general savings clause. "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." FTA § 601(c)(1). Not only did Congress limit the general preemptive power of the Act, but it further expressly delegated an important and integral role to the state commissions in establishing prices under the act as follows:

> (1) Interconnection and network element charges. Determinations *by a State commission* of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—
>
> (A) shall be —
>
> > (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
> >
> > (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

47 U.S.C. § 252(d)(1) (emphasis added).[1]

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[1] The F.C.C. has implemented these standards with regulations outlining the TELRIC costing methodology. For example, 47 C.F.R. § 51.503(b) provides in pertinent part:

> (b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, *at the election of the state commission* –
>
> (1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 5 1.511 ....

(emphasis added) and 47 C.F.R. § 51.505(a) provides in pertinent part:

The only question we must answer is whether a Wisconsin order requiring an incumbent carrier to offer by tariff the same network elements available by negotiated and arbitrated interconnection agreements is "inconsistent" with the "provisions" of the Act. The majority says yes. I disagree.

There are several points to be made in response to the majority. The majority, in essence, reduces the conflict to one of an alternative procedure when it bemoans that, "at the very least[,]" the tariff authorizes a "parallel procedure," and that tariffing is "making hash" of the 135 day waiting period before the state can be summoned to arbitrate in a manner similar to its function in the tariffing process. In this discussion, the majority appears to echo the errors of the Sixth Circuit, which has similarly justified preemption based on interference with § 252's procedure. The Sixth Circuit found preemption by misinterpreting the Supreme Court decision in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), involving the preemptive effect of the Federal Occupational Safety and Health Act (OSHA) on parallel state regulation. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002); cf. *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 360 (6th Cir. 2003) (finding no preemption because tariff did not give entrant an "alternative route around the entire interconnection process"). These Sixth Circuit cases argue that, because the negotiation method was prescribed by §

(a) In general. The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and (2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).

252, any other method allowing one to foreshorten negotiation/arbitration must be preempted.

This result is reached, however, by seizing upon a quotation from *Gade* and using it out of context. *Gade*, 505 U.S. at 103 ("A state law also is preempted if it interferes with the methods by which the federal statute was designed to rech th[at] goal.") (alterations in original), quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). However, *Gade* was based on a finding that, with respect to occupational safety and health, Congress has intended to occupy the whole field. The quotation cited by the Sixth Circuit, in context, merely reinforces *Gade's* conclusion that OSHA preempted the entire field of parallel state regulation. Therefore, of course, any state law that circumvented the procedure outlined in OSHA would be preempted. By contrast, with respect to competition for local telephone service, no one has claimed that Congress intended to occupy the whole regulatory field. As the excerpt that I have quoted from the Act shows, the state commissions occupy a key role in the regulatory scheme. Hence, the whole idea that the *method* of negotiation/arbitration is exclusive and preemptive has no sound legal basis. While *Gade* showed a clear intent to exclude parallel state regulation, the Act here does not exclude, but rather specifically embraces, such parallel regulation. So a finding of preemption here requires much more than merely a parallel procedure. Something about tariffing must interfere with the purpose and structure of the Act. *See, e.g., In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460, 3526 (1997) (finding that state tariffing of telecommunications services for resale not preempted because it did not prohibit entrants from demanding negotiation/arbitration under § 252).

The majority appears to be reaching for an argument that the tariff interferes with more than a method when it laments the economic "thumb on the negotiating scales" it believes that tariffing imposes on Wisconsin Bell. But in context this argument lacks substance – the § 252 mechanism already contemplates a very similar "thumb" inherent in its negotiation/arbitration method of interconnection. What the Public Service Commission of Wisconsin (PSC or commission) has told us is that it would use the federal TELRIC[2] methodology mandated by the F.C.C. and approved by the Supreme Court, if called upon to evaluate a proposed tariff. *Verizon*, 535 U.S. 467. This is the methodology the PSC must use whenever it is requested to arbitrate interconnection negotiations under the Act, or to approve an arbitrated interconnection agreement under the Act or to approve the eerily tariff-like Statement of Generally Available Terms that Wisconsin Bell could choose to file under § 252(f).[3] So any negotiation of an interconnection agreement is an option backed by the readiness of a state commission to intervene at any time on the request of any party, at which point the commission will set rates, and will use the TELRIC methodology to do so. The state's role as a ratemaker, even under the regime of the Act, is still central. *See Verizon*, 535 U.S. at 476-77, 489, 493 (explaining that the FTA clearly contemplates a central role for state commissions in setting interconnection lease rates under the standards set by the F.C.C., i.e., TELRIC). In fact, the state's function and the appropriateness of TELRIC have been the subjects of two lawsuits pursued to the

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[2] TELRIC is Total Element Long-Run Incremental Cost, the cost-based methodology for determining the price of network elements necessary to interconnection under the Act. It was prescribed by the F.C.C. under the Act. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

[3] *See* 47 U.S.C. § 252(d); 47 C.F.R. §§ 51.501-505.

Supreme Court by incumbent companies. *Id.; AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119, S. Ct. 721, 142 L.Ed.2d 835 (1999).[4]

To ponder the majority opinion is to imagine that the tariff requirement would somehow bludgeon Wisconsin Bell into revealing negotiating secrets, like its reservation price, that it would otherwise be able to protect, or into otherwise bargaining from an inferior position. The reality is that any entrant that does not feel satisfied with Wisconsin Bell during negotiations can summon the PSC to follow a procedure virtually identical to what is going on unilaterally during the tariffing process at issue. In fact, if anything, the statutory role of the PSC as arbitrator is more intrusive than the tariffing process at issue here. In tariffing, Wisconsin Bell has the opportunity to propose the terms of the tariff, which ordinarily are not disturbed. As arbitrator, however, the PSC dictates the rate, in accordance with TELRIC. In other words, the tariff procedure (a process employed since time immemorial in the regulation of local telecommunications carriers) gives a very similar result through a process just like the negotiation/arbitration method, lacking only the initiating request by an entering competitor to negotiate. And at the end of either process, negotiation/arbitration or tariffing, an aggrieved Wisconsin Bell can challenge the result in federal court. I believe the majority is incorrect when it claims that a tariffing challenge would go to state court. Insofar as the challenge would concern the state's application of the TELRIC standard in evaluating a tariff, it is likely that the federal courts would have jurisdiction over the matter, just as they would over a

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[4] Historically, state commissions (although not necessarily Wisconsin's) generally favored the former Bell system companies in their struggles with the F.C.C.'s preaching of competition.

challenge to an arbitrated interconnection agreement. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635 (2002).

But, says the majority, the method of § 252 represents Congress's careful compromise of interest group positions and any regulation that influences or alters that process risks undermining the "protection" afforded incumbents like Wisconsin Bell. That is an interesting thought, but unsupported by the statute. And even if one does believe the method outlined in § 252 is designed to provide some measure of protection to incumbents, any postulated loss of supposed protection through the tariffing method is illusory. One need only examine two hypothetical negotiations to see this. In one negotiation there exists a PSC-approved tariff and in the other there is no tariff. In the tariff negotiation, Wisconsin Bell will likely obtain no price higher than its tariff offers since the entrant will either accept the tariff or negotiate with Wisconsin Bell for a price lower than the tariff. In the non-tariff negotiation Wisconsin Bell can, as the majority believes proper, propose any price it chooses. The entrant, however, knowing that it can always look to the state to participate eventually, will not accept a price greater than what it would eventually get from the state – presumably an amount roughly equal to what the tariff price would be (since the same methodology would be used in both instances).[5] Either way, the applicability of the

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[5] This presumes, of course, that, as the TELRIC methodology promises, the resulting tariff is not merely a one-size-fits-all menu of prices and services, but is, instead, sensitive to the variations in cost from entrant to entrant. *See Verizon*, 535 U.S. at 496 n.16 ("The actual TELRIC rate charged to an entrant leasing the element would be a fraction of the TELRIC figure, based on a 'reasonable projection' of the entrant's use of the element (whether on a flat or per-usage basis) as divided by aggregate total use of the element by the entrant, the incumbent, and any other

ubiquitous TELRIC standard limits incumbents' bargaining power. Wisconsin Bell cannot avoid the fact that its "reservation" price is, in this way, always quasi-public in all interconnection environments.

From all appearances, requiring a tariff is not inconsistent with the negotiation of a price or with the ultimate prescription of a price determined by the state commission as arbitrator. This is especially so, given that the tariff does not impede the right of an entrant to demand negotiation. It may be that the majority, the district court and some other courts that have viewed this problem have looked upon the negotiation phase as providing a purely "free market" solution as opposed to a regulatory solution. I think this dichotomy simply does not exist here, where all parties are bound to the TELRIC method of rate determination. In fact, as the Supreme court has recognized in rejecting the challenges of incumbent companies, TELRIC controls throughout. *See* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 Cornell L. Rev. 885, 969 (2003) ("TELRIC thus governs all of the important pricing aspects of the access regime created by the 1996 Act.").

Finally, the majority includes a discussion of the hypothetical process by which a tariff is proposed and then approved by the PSC. But what is involved here is simply a facial challenge to the PSC's ability to require tariffing under any circumstances. No price term or any other term for the tariff has yet been proposed. Speculation about possible

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competitor that leases it."). The majority makes much of the fact that the PSC has asserted that Wisconsin Bell (and everyone else) is bound by the TELRIC costing methodology. But this is merely a restatement of what federal law, implemented by a federal agency, has decreed. *See* note 1, *supra*.

terms is, therefore, beside the point in this facial challenge, and the only issue is whether there is any set of facts under which the PSC can require tariffing.

In fact, the majority's hypothetical discussion goes seriously astray by fortifying its arguments with quotations from PSC decisions and orders that do not concern the Operational Support Systems (OSS) tariffs at issue here, but are, instead, orders and decisions with respect to the establishment of TELRIC standards for the *negotiation and arbitration mechanism* of the Act.[6] *See UNE Compliance Order*, Investigation into Ameritech Wisconsin's Unbundled Network Elements, Docket No. 6720-TI-161, available at http://psc.wi.gov/pdffiles/order_notc/6145.PDF (Public Service Commission of Wisconsin July 9, 2003); *Final Decision*, Investigation into Ameritech Wisconsin's Unbundled Network Elements, Docket No. 6720-TI-161, available at http://psc.wi.gov/pdffiles/ord_notc/4534.PDF (Public Service Commission Wisconsin Mar. 22, 2002) ("*UNE Final Decision*"). I am tempted to dismiss these decisions as simply inappropriate and irrelevant with respect to the present case's evaluation of OSS tariffs, especially as used by the majority. Or I might point out that the majority's claim that "it is the commission, not Wisconsin Bell, that is making the tariff in a realistic sense" does not logically follow from the part of the decision quoted because that refers to PSC actions on standards for arbitration and has

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[6] The PSC was the first to bring the two UNE Orders into the present case when, in its second supplemental brief, it used a quotation from the UNE Final Decision to support its claim that TELRIC is a methodological means, not a ratesetting end. However, the majority overreaches when it uses these documents to demonstrate that the PSC exercises control over the final result of the tariffing process.

nothing to say about the OSS tariffs.[7] Or, in the alternative, I might note a certain irony in how the "realistic sense" in which the PSC is allegedly "making the tariff" is actually the PSC acting as arbitrator to the interconnection process that the majority ostensibly seeks to protect. But instead, I will only comment that the UNE decisions' TELRIC discussions cited by the majority reinforce my basic premise, which is that the tariffing is not markedly different from the negotiating and arbitrating procedure. The differences are purely matters of form, not involving substance, and are not inconsistent with the provisions of the Act.

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[7] In fact, when one continues to read onward, but a few pages later, the PSC does finally have something to say about tariffs (but not the OSS tariffs). These tariffs are required under the *UNE Final Decision* as a temporary offering made available to entrants who have requested interconnection and are to be used only during the pendency of the negotiation/arbitration. *UNE Final Decision* at 187 ("[Wisconsin Bell]) is required to file UNE tariffs in addition to the tariffs already required under the OSS order . . . Those tariffs [the OSS tariffs] will meet the tariffing requirement in this order, but are not time limited as are the other tariffs ordered herein."). The PSC notes, tellingly,

> To implement the tariffing decision, the Commission required [Wisconsin Bell] to file proposed tariffs in its compliance filing. However, in Wisconsin, when tariffs are placed on file, *Commission approval is not required.* Additionally, [*Wisconsin Bell*] *is allowed to revise tariffs without Commission approval.* Accordingly, when issues arise about the terms and conditions of offerings, it is expected that arbitration panels will determine whether terms of offerings are nondiscriminatory and comply with federal and state requirements. The tariffs filed as a result of this proceeding do not limit an arbitration panel's ability to establish such compliant terms and conditions.

UNE Compliance Order, at 65 (emphasis added). To the extent that this Order is relevant to the present case, I do not believe it offers support to the majority opinion.

When one strips away the tangential distractions, the majority has ruled that Congress intended there to be only one method to achieve interconnection and establish its terms. The Act does not support this conclusion.

I therefore respectfully dissent.

Appendix B

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, PLAINTIFF-APPELLEE, *v.* AVE M. BIE, ET AL., COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS-APPELLANTS, AND WORLDCOM, INC., INTERVENING DEFENDANT APPELLANT.

No. 02-3854 & No. 02-3897

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JUDGMENT – WITH ORAL ARGUMENT

August 12, 2003

Before CUDAHY, POSNER and EASTERBROOK, Circuit Judges.

Appeals from the United States District Court for the Western District of Wisconsin

No. 01 C 690, Barbara B. Crabb, Chief Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

Appendix C

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, PLAINTIFF, v. AVE M. BIE, ET AL., COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN (IN THEIR OFFICIAL CAPACITIES AND NOT AS INDIVIDUALS), DEFENDANTS, AND WORLDCOM, INC., DEFENDANT-INTERVENOR.

No. 01-C-0690-C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

OPINION AND ORDER

September 26, 2002

This is a civil action for declaratory and injunctive relief in which plaintiff Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin, challenges a final decision issued by the Public Service Commission of Wisconsin on September 25, 2001. Plaintiff contends that the decision violates the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, as codified in scattered sections of Title 46 of the United States Code, by (1) requiring plaintiff, an incumbent local exchange carrier, to combine certain unbundled network elements for new entrants and (2) imposing a tariffing requirement.

The case is before the court in an unusual posture. At the briefing stage, plaintiff substituted a new claim for the claim it had alleged in its amended complaint without seeking leave to amend its complaint to delete its original claim and assert a replacement claim. Not surprisingly,

defendants object to plaintiff's change of position as one that they were not prepared to address. I agree with defendants that the new claim is not properly before the court. Even if it were, it would have to be dismissed for lack of subject matter jurisdiction because it fails to state a case or controversy. In addition, I conclude that because plaintiff failed to argue the claim it pleaded in its amended complaint, it has waived that claim. As to the second count of plaintiff's amended complaint, I find that the commission's final decision imposes a tariff that an entrant may select in lieu of negotiating an interconnection agreement and that the decision is inconsistent with § 252 of the Telecommunications Act and preempted by it. Accordingly, I will grant plaintiff's request for a declaration of the invalidity of the tariff requirement.

BACKGROUND

On September 25, 2001, defendant commissioners issued a final decision that required plaintiff (an incumbent local exchange provider) to provide two types of network element combinations to new entrants: unbundled network element platforms and extended enhanced links. *Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems*, Docket 6720-TI-160, at 16 (Sept. 25, 2001). Network elements are the equipment and facilities used to run the telephone network and provide services. 47 U.S.C. § 153(29). Two aspects of the decision are at issue. First is the requirement that plaintiff "offer current and new combinations of both UNE-Ps and EELs in interconnection agreements and related negotiations consistent with federal law." *Id.* at 31. Second is the requirement that plaintiff offer these combinations as a "general proposition" by means of a tariff, *id.* at 17-18, that is, by setting out a general statement of terms and conditions

under which plaintiff must make the combinations available to any new entrant who asks for them.

The commission did not make tariffs the exclusive means by which plaintiff was to offer unbundled network element platforms and extended enhanced links combinations; it recognized that plaintiff could provide the combinations through interconnection agreements, pursuant to 47 U.S.C. §§ 251-52. *Final Decision* at 17. In response to plaintiff's argument that the Telecommunications Act does not allow state commissions to require incumbents to sell services, network elements or interconnections by tariff, rather than by negotiated agreement, the commission held that preemption would not apply because it was requiring tariffs for two services only. "[T]he services together cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether. Furthermore, the [Telecommunications Act]'s contemplation of tariffing to satisfy [a Statement of Generally Available Terms] requirements in § 252 (f)(1) and the state action protection afforded in §§ 251(d)(3), 252(e)(3), and 261(c) strongly imply that Congress was not preempting state power to order tariffing of services otherwise consistent with the [Telecommunications Act]." *Final Decision* at 18.

On October 15, 2002, plaintiff sought a rehearing before the commission, arguing in relevant part that "neither state nor federal law permit [sic] the Commission to require [plaintiff] to offer new combinations of unbundled network element platforms (UNE-Ps) or extended enhanced links (EELs)." *Order Denying Rehearing: Investigation into Ameritech Wisconsin Operational Support Systems*, Docket 6720-TI-160, at 2 (Nov. 14, 2001). On December 13, 2001, plaintiff filed this cause of action. On January 30, 2002, the

proceedings were stayed on the parties' motion, awaiting the Supreme Court's ruling in *Verizon Communications, Inc. v. Federal Communications Commission.* On May 13, 2002, when the Supreme Court issued its opinion in *Verizon*, 535 U.S. __, 122 S. Ct. 1646 (2002), the stay lifted automatically.

OPINION

A. Count I: Combining Unbundled Network Elements

1. Sufficiency of the pleadings

The initial question is whether plaintiff is asserting an entirely new claim in place of the issue it pleaded in its amended complaint. Originally, plaintiff argued that the commission's decision was unlawful because it requires incumbents, rather than entrants, to combine unbundled elements; now it argues a different issue: the commission's decision is unlawful because it lacks any terms and conditions that limit an incumbent's duty to combine unbundled elements. Plaintiff denies it made any material change in its position. It argues that the only issue is whether remand is "appropriate to allow the Commission to conform its Order to a recent, controlling decision of the United States Supreme Court, when the Commission's Order does not reflect (and could not have reflected) the specific holding of the Supreme Court [in *Verizon*, 122 S. Ct. 1646]?" Plt.'s Reply Br., dkt. #27, at 2.

Plaintiff's characterization of its original claim is much broader than the claim it alleged in its amended complaint. Plaintiff alleged that the "Commission's requirement that [plaintiff , an incumbent,] combine network elements for [entrants] is contrary to and preempted by controlling federal law." Plt.'s Am. Cpt., dkt. #14, at ¶ 35.

Plaintiff contended that the commission was required to follow the court's ruling in *Iowa Utilities Bd. v. Federal Communication Commission*, 219 F.3d 744 (8th Cir. 2000), that it "is not the duty of the [incumbent] to 'perform the functions necessary to combine unbundled network elements in any manner' as required by the FCC's rule." Plt.'s Am. Cpt. dkt. #14, at ¶¶ 36, 38 (quoting *Iowa Utilities*, 219 F.3d at 759). Moreover, the parties stipulated in their preliminary pre-trial conference report that "[i]t is [plaintiff's] position that the 1996 Act requires [entrants] to perform the task of combining network elements, and that the [commission's] [d]ecision is contrary to and preempted by federal law." Prelim. Pre-Trial Conf. Rpt., dkt. #11, at 2.

Now, plaintiff has changed its claim of unlawfulness from an attack on the commission's insistence that the incumbent must provide new combinations of network elements to an entirely different one that the commission may require incumbents to combine network elements for entrants only if the requesting carrier is unable to combine those elements, if it would not place the incumbent at a competitive disadvantage and if it would not place competing carriers at a competitive disadvantage. This change in posture is a direct response to the Supreme Court's holding in *Verizon*, 122 S. Ct. at 1687, that incumbents must provide unbundled network elements to entrants in certain circumstances.

Plaintiff concedes that the holding in "*Verizon* moots [its] argument to the extent that [the argument] relies upon [*Iowa Utilities*, 219 F.3d 744]," but argues that its original claim encompasses the argument that the commission has authority to require incumbents such as plaintiff to create combinations only in the circumstances specified in *Verizon*. Plaintiff notes correctly that the Court of Appeals for the

Seventh Circuit has emphasized the liberal nature of notice pleading, *see, e.g., Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (holding that discrimination complaint need allege only "I was turned down for a job because of my race" to conform with Fed. R. Civ. P. 8(a)), but overstates the scope of the court of appeals' approach. The court has not abandoned the requirement that a plaintiff must give her opponent "fair notice of what [her[claims is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). If a plaintiff alleges she was turned down for a job because of her race, she cannot argue later that she was discriminated against on the basis of gender, without amending her complaint. By shifting its position as to *which aspect* of the commission's ruling is allegedly unlawful (not to be confused with *which legal theory* makes the ruling unlawful), plaintiff is arguing a claim it never pleaded.

2. Waiver

Defendants and defendant-intervenor have divergent viewpoints as to which claim plaintiff has waived. Interesting as their positions are, however, it is not necessary to discuss them in any detail. Plaintiff waived its *original* claim (as pleaded in its amended complaint) because it never briefed it. *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). It cannot argue its new claim because it did not amended its complaint to assert the new claim, so as to give defendants fair warning it was raising it, and for the additional reason that it cannot show the existence of an actual case or controversy.

(Defendants contend that plaintiff "waived" its new claim by failing to raise it before the state commission. In so

contending, they seem to be relying on a non-existent exhaustion requirement. Claims brought under § 251 or § 252 of the Telecommunications Act do not require exhaustion of administrative remedies, only a final determination by the commission. 47 U.S.C. § 252(e)(6). Defendants do not argue that plaintiff is trying to appeal an issue that was never the subject of a final determination; that might be another ground for not entertaining the claim, if one were needed.)

Plaintiff argues that because the commission's final decision lacks any terms and conditions, it "appears" to impose a duty on plaintiff that "goes beyond what the Act and the FCC's rules authorize," Plt.'s Merits Br., dkt. #19, at 12, and "appears" to impose a duty to combine "in any circumstance." *Id.* at 13. Ignoring the effect of its own tentative language, plaintiff asserts that a controversy exists because the commission has failed to state affirmatively either that it is bound by the ruling in *Verizon*, 122 S. Ct. 1646, or that its final decision does not impose any additional duties on plaintiff to combine beyond those set forth in *Verizon*. Plaintiff's concerns do not turn this issue into a justiciable case or controversy. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (federal court lacks power to render advisory opinions); *see also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1187 (7th Cir. 1998) ("A court is not permitted to prescribe how a state must deal with disputes that have never arisen and may never do so . . . Such a foray is the paradigm of an advisory opinion."); *North American Natural Resources, Inc. v. Strand*, 252 F.3d 808, 814 (6th Cir. 2001) (no case or controversy when challenge is based "not on what the [state commission] has done, but rather on what it has not done").

Plaintiff argues alternatively that it has a "well-founded fear that the Commission will seek to extend the limits imposed by *Verizon* under the rubric of 'consistent' state regulation" and that this fear is enough to render an opinion non-advisory. In support of its position, plaintiff cites *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988), a First Amendment case in which the Court held that pre-enforcement challenge to a state statute prohibiting the commercial display of sexual material allegedly harmful to juveniles did not deprive booksellers of standing to maintain suit because (1) the state had not suggested that the newly enacted law would not be enforced; (2) the booksellers alleged an actual and well-founded fear that the law would be enforced against them; and (3) the alleged danger was in large measure one of self-censorship, a harm that could be realized without actual prosecution. However, merely proclaiming that one has a "well-founded fear" is not enough to establish the truth of the proclamation.

On its face, plaintiff's assertion is inconsistent with the explicit provisions in the commission's ruling that plaintiff is to offer combinations "consistent with federal law." *Final Decision*, 6720-TI-160, at 31. Unless and until defendant commissioners set forth specific combination requirements that plaintiff can show exceed the limits prescribed in *Verizon*, no case or controversy exists.

B. Count II: Tariffing Requirements

Count II raises the question whether a state commission can require incumbents to provide unbundled access through a tariff, that is, a statement of the fixed terms upon which the incumbent will sell network elements to any competitor, or whether the Telecommunications Act prohibits commissions from requiring incumbents to sell

network elements by any method other than the negotiated agreement provided for in § 252 of the Act. Plaintiff argues that a commission impose such a requirement; defendants disagree.

Under the Telecommunications Act, incumbent local exchange carriers must resell their telecommunications systems by negotiating binding agreements with competitors. 47 U.S.C. § 251(b)(1). If there is a request for "interconnection, services or network elements . . . an incumbent local exchange carrier may negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). Both the incumbent and competitor must negotiate in good faith. 47 U.S.C. § 251(c)(1). If the parties are unable to reach an agreement, either party may petition for binding arbitration before the state commission, 47 U.S.C. § 252(b), under arbitration standards set by the act for application by the state commission. 47 U.S.C. § 252(c) and (d).

In determining the legality of any state-imposed requirement on the telecommunications industry, a court must consider the interplay of federal and state law. In the Telecommunications Act, Congress gave sweeping authority to the federal government to regulate telecommunications, *see, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 379 n.6 (1999) ("With regard to the matters addressed by the [Telecommunications] Act," the federal government has "taken the regulation of local telecommunications competition away from the States"). In the same act, however, Congress acknowledged the role of state governments in fostering industry competition. *See* 47 U.S.C. § 261 (state commissions can impose their own rules "in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of the [Telecommunications Act]").

In this case, the commission found that unbundled network element platforms and extended enhanced links combinations "qualify as unbundled access" under Wis. Stat § 196.01(1b), and concluded that "they must be tariffed by [plaintiff] pursuant to Wis. Stat. §§ 196.196(2)(a) and 196.219(2m)." *Final Decision*, at 17-18. Acknowledging that these combinations "can also be sought in new interconnection agreements under [47 U.S.C.] §§ 251 and 252," the commission stated that it was not attempting to create "a complete regime of state-ordered tariff offerings that bypass §§ 251 and 252 altogether." *Id.* The question is whether the commission was correct about the nature of its tariff requirement and whether that requirement is consistent with the procedures Congress prescribed in § 252 for gaining access to unbundled elements.

Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection. The commission's decision requires plaintiff to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision.

Even if a state-imposed tariff furthers competition, as the commission's action seems to do, it may be preempted "'if it interferes with the *methods* by which the federal statute was designed to reach [its] goal.'" *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 809 (W.D. Mich. 2000) (emphasis added) (quoting *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992)). In *Verizon North*, the tariff at issue required the incumbent to offer its network elements and services for sale on fixed terms without

requiring negotiation of an interconnection agreement. In that respect, it was like the tariff struck down in *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Or. 1999), because it "*completely* displace[d] the interconnection agreement" and for that reason, was inconsistent with the act and preempted by it. *Verizon North*, 190 F. Supp. 2d at 809. (Emphasis added). The Oregon tariff dispensed with the interconnection agreement mechanism and allowed entrants to order services "off the rack" without entering into an interconnection agreement. *MCI*, 41 F. Supp. 2d at 1176. In effect, the state established a procedure that bypassed the Act entirely and ignored the procedures and standards that Congress had established. *Id.* at 1178. In *Verizon North*, 140 F. Supp. 2d at 810, the court found Michigan's tariff requirement improper because "Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act" and requiring the incumbent "to file public tariffs offering its network elements . . . to any party . . . evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act."

In this case, the state commission did not impose a tariff requirement that covered all possible network elements, services or interconnections but limited the requirement to only two network combinations (unbundled network element platforms and extended enhanced links). However, the net effect is the same. By forcing the incumbent to file a tariff that any entrant can select unilaterally without having to negotiate an interconnection agreement, the commission has imposed a requirement that circumvents the interconnection agreement process prescribed under § 252.

Defendants try to distinguish the state's tariff, arguing that it is not the exclusive means to gain access to unbundled network element platforms and extended enhanced links. This distinction holds up only if the entrant chooses to negotiate an interconnection agreement rather than opting for the tariff. The "non-exclusivity" of the tariff applies only to the extent that an entrant decides against it; the incumbent has no choice in the matter. It is not persuasive that, as defendants argue, "any [entrant] having a healthy respect for its competitive and financial well-being is likely to negotiate for better pricing than the average pricing represented by tariffs." Dfts. Resp., dkt. #22, at 27. This possibility does not make the entrant's choice any less unilateral. Rather, it raises the question why the commission would impose tariff requirements it thinks only unsophisticated entrants will use.

Defendants argue that tariffs are not inconsistent with the Telecommunications Act, as demonstrated by the fact that negotiating parties may incorporate tariffs into their interconnection agreements. *See, e.g., U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002) (tariffs may be opted for as part of interconnection agreement). This is correct but irrelevant. The issue is not the ability of the incumbent and entrant to agree on the use of a tariff within an interconnection agreement. Rather, the issue is whether it is permissible in light of § 252 to force the incumbent to issue a tariff that an entrant can select unilaterally without negotiating an interconnection agreement.

I am persuaded by *Verizon North* and *Michigan Bell* that because the commission's final decision allows the entrant to choose a tariff over an interconnection agreement, it creates a means of evading the interconnection agreement

process established in § 252. Like the tariffs in *Verizon North* and *Michigan Bell*, the tariff in this case completely displaces the incumbent's ability to negotiate unbundled network element platforms and extended enhanced links combinations through congressionally prescribed interconnection agreements when the entrant opts for the tariff.

Plaintiff points out that in a recent decision, the FCC held that:

> Consistent with the [Telecommunications Act's] recognition of parties' right to negotiate interconnection agreements, the parties are certainly free to agree that services will be provided pursuant to tariffs filed with the appropriate [state] commission, and they have done so with respect to certain services. Where the parties fail to agree, however, and ask a state commission to set rates or resolve other issues relating to the interconnection agreement, a carrier cannot use tariffs to circumvent the Commission's determinations under section 252(e)(6).

In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration, No. DA-02-1731, 2002 WL 1576912, Memorandum Opinion & Order, at ¶ 602 (July 17, 2002). In this ruling, the FCC was approving the parties' agreement that services would be provided pursuant to tariffs, In stark contrast, under the regime proposed in this case, the parties *do not agree* that

services will be provided pursuant to a tariff. An entrant can opt for the tariff unilaterally without having to reach an agreement with the incumbent. This would violate the FCC's ruling that, if the parties fail to agree, a carrier cannot simply resort to a tariff to solve the disagreement. *See also U.S. West*, 275 F.3d at 1250 (upholding tariff requirement that did not allow entrants to order services "off the rack" but did allow them to incorporate tariffs into their interconnection agreements; tariff provision did not allow entrant to bypass interconnection agreement).

Defendants argue that the FCC held in another order that it was permissible to use a tariff that imposed a 5% minimum discount because "if the five percent discount is unattractive, there is nothing in [the tariff] that prohibits [entrants] from seeking flat rated local exchange service for resale through negotiation and arbitration pursuant to sections 251 and 252 of the Act." *See In the Matter of The Public Utility Commission of Texas*, 13 F.C.C.R. 3460, No. FCC 97-346, at ¶¶ 138-39. (Oct. 1, 1997). This holding is inapplicable because it centers on the conflict between a tariff and two substantive provisions of the act, rather than the permissible *method* for obtaining these services. Moreover, the FCC stated that it "accept[s] the Texas Commission's interpretation that this provision presents an option that [entrants] may elect under state law, but in no way interferes with a carrier's ability to invoke the negotiation and arbitration procedures in the Communication Act." *Id.* at ¶ 15. In this case, by contrast, the tariff interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff.

Because defendant commissioner's final decision imposes a tariff that the entrant may select unilaterally in lieu

of the interconnection agreement process, it is inconsistent with § 252 of the Telecommunications Act. Accordingly, plaintiff's request for a declaration of invalidity will be granted.

ORDER

IT IS ORDERED that

1. The request for a declaration by plaintiff Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin, that the Public Service Commission of Wisconsin has violated the Telecommunications Act of 1996 by requiring in its *Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems*, Docket 6720-TI-160 (Sept. 25, 2001), that incumbents combine unbundled network element platforms and extended enhanced lines for new entrants is DENIED;

2. Plaintiff's request for a declaration that the commission's tariffing requirement is inconsistent with and preempted by Telecommunications Act of 1996 is GRANTED; and IT IS DECLARED that the commission's tariffing requirement, as set forth in its *Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems*, Docket 6720-TI-160 (Sept. 25, 2001), is inconsistent with and preempted by § 252 of the Telecommunications Act.

Entered this 26th day of September, 2002.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Appendix D

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, PLAINTIFF, v. AVE M. BIE, ET AL., COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN (IN THEIR OFFICIAL CAPACITIES AND NOT AS INDIVIDUALS), DEFENDANTS, AND WORLDCOM, INC., DEFENDANT-INTERVENOR.

No. 01-C-0690-C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JUDGMENT

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff's request for a declaration that the commission's tariffying requirement is inconsistent with and preempted by Telecommunications Act of 1996 is GRANTED; and IT IS DECLARED that the commission's tariffying requirement as set forth in its *Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems*, Docket 6720-TI-160 (Sept. 25, 2001), is inconsistent with and preempted by Sec. 252 of the Telecommunications Act.

Approved as to form this 30th day
of September, 2002.

/s/ Barbara Crabb

BARBARA B. CRABB
U.S. District Judge

/s/ Joseph W. Skupniewitz

Joseph W. Skupniewitz, Clerk of Court
Date: September 30, 2002

Appendix E

FINAL DECISION BEFORE THE PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation Into Ameritech Wisconsin Operational Support Systems

No. 6720-TI-160

FINAL DECISION (Phase 1)

Dated Mailed: September 25, 2001

This is the final decision in the first phase of this docket to investigate the Operational Support Systems (OSS) of Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin (Ameritech or AW).[1] Phase I of this docket addresses the development of OSS performance measures, benchmarks, related business rules, and addresses how the OSS performance testing should proceed. Phase II, which has already commenced, is comprised of the OSS testing itself and evaluation of the results. Testing is expected to take several months.

A list of participating parties is attached hereto as Appendix A.

1/ Operational Support Systems (OSS) generally refer to systems by which an incumbent local exchange provider makes wholesale service available to competitive local exchange carriers, or CLECs. These systems may a have a combination of manual and electronic interfaces. Major system components may include pre-ordering; ordering and provisioning; maintenance and repair; network performance; unbundled elements; operator services and directory assistance; system performance; service center availability and billing.

Introduction

This proceeding is one of a trio of proceedings commenced by the Commission to promote and ensure the development of effective competition in the local exchange telecommunications markets in this state, based upon the Telecommunications Act of 1996.[2] Overall, the purpose of this proceeding is to investigate and determine whether or not Ameritech's OSS for wholesale transactions with its competitors operate without discriminatory impact upon the competitors and provide access to Ameritech's network. The other two proceedings, docket 05-TI-283[3] and docket 6720-TI-161[4], addressed, respectively, reciprocal compensation between an ILEC and new entrants and the pricing of unbundled network elements (UNEs) in Ameritech's network.

This proceeding has been complex and time-consuming, and more is yet to come. Nonetheless, the Commission applauds all participants for resolving almost all issues through extensive negotiations in numerous prehearing conferences. That process greatly reduced, to a few days, what might have been an enormously long and complicated hearing dealing with hundreds of issues. The Commission believes that through the negotiations, conducted with the assistance of the Commission's staff and consulting

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2/ Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act) (Codified at scattered sections in Title 47 United States Code). *References* herein to statutory sections denoted with a "§" denote a section in 47 U.S.C., unless otherwise noted.

3/ *Investigation of the Compensation Arrangements for the Exchange of Traffic Directed to Internet Service Providers.*

4/ *Investigation Into Ameritech Wisconsin's Unbundled Network Elements.*

facilitator, the public will ultimately benefit because the most knowledgeable parties, who will implement and use the OSS on a day-to-day basis, have arrived at mutually acceptable arrangements. The Commission has approved most, if not all, of these negotiated arrangements. Within the parameters set by the 1996 Act and Wisconsin's 1993 Wis. Act 496 (Act 496), the public interest in maximum competition will be best served over the long run by fair "rules of engagement" that the market place participants themselves develop.

A summary of the history of these proceedings is appropriate. The Commission issues its Notice of Proceeding and Investigation and Assessment of Costs and Prehearing Conference (Notice) on December 15, 1999. A prehearing conference was held on January 11, 2000, and was continued in light of the numerous substantive and procedural issues raised and requiring disposition. At a subsequent conference on February 5, 2000, a four-day hearing was set for July 18, 2000. The parties, however, also developed a Statement of Principles that identified certain substantive agreements about testing and some procedures.

On March 29, 2000, the Commission issued an interlocutory order (March 29 Order), which substantially agreed with the parties' Statement of Principles. The March 29 Order adopted several measures to allow the parties to continue identifying and negotiating issues but also tentatively made certain substantive determinations respecting the Phase II test: region-wide[5] testing was deferred; a Commission-approved third-party tester of OSS

5/ "Region-wide" denotes the five states, Illinois, Indiana, Michigan, Ohio, and Wisconsin, in each of which Ameritech Corp., a wholly-owned subsidiary of SBC Communications, Inc. as of October 9, 1998, operates a RBOC as defined under § 153(4)(A).

would be required; and the test would include a pseudo-CLEC (CLEC)[6] operating under Commission oversight. The Commission reserved all ultimate test evaluation authority; testing could not begin without Commission approval; military-style testing[7] would be employed; and CLECs would have access to no less information than the tester would receive from Ameritech. Among the procedural provisions adopted was a directive to appoint a second, temporary administrative law judge (ALJ) to guide the continued prehearing discussions and negotiations and to produce a report summarizing the outcome by June 1, 2000.

On May 3, 2000, the Commission issued two orders implementing two components of the March 29 Order. In one order, the Commission authorized retention of a coordinator (referred to herein as a "facilitator") by directing AW to contract with Kern & Assoc., Inc. In the second order, the Commission directed AW to contract with the Commission's choice of a third-party tester, KPMG Consulting, LLC (KPMG). In addition, the order provided that Hewlett-Packard (HP) be retained under contract with AW as a test transaction generator and provider of an interconnect gateway. The Commission retained jurisdiction to approve the contracts and directed that the agreement with KPMG have certain conflict of interest prohibitions. Both contracts had provisions requiring KPMG and HP to "cooperate fully with each other in performing their responsibilities." (Order Approving Retention of Third-Party Tester and Pseudo-CLEC, May 3, 2000, at 2).

6/ "CLEC" denotes a competitive local exchange carrier a generic label for any new facilities-based entrants competing with incumbent local exchange carriers (ILECs).

7/ Defined in Finding of Fact ¶ 5.

On July 19, 2000, the Commission issued another Order (July 19 Order) upon consideration of the June 1 Report of the Temporary ALJ and a stipulation by the parties arrived at in a June 8, 2000 prehearing conference. The July 19 Order continued the prehearing conferences for further negotiations adopted certain issue resolutions presented by the parties, and postponed the July 18, 2000 hearing until November 2000. The Commission also ordered the Temporary ALJ to continue supervising the process, and to file a second report on resolved and unresolved issues on October 1, 2000. October 2, 2000, was set as the prehearing conference at which the November 2000, hearing would be formally scheduled.

Ameritech was also ordered to provide or improve certain OSS enhancements, processes, and procedures before they would be tested. (July 19 Order, para. 7, at 4-8).

The Temporary ALJ's Second Report, dated October 1, 2000, further narrowed the contested issues and identified those issues likely to go to hearing. On October 13, 2000, the principal case Administrative Law Judge, Jeffry Patzke, issued an Order to Amend Issues List, which established the final issues list for hearing, based on the labeling of 27 "A-AA issues" used in the Second Report.

The hearing commenced on November 28, 2001. The parties requested and received an adjournment of the hearing and again met and settled additional issues, leading to a Joint Motion (with attached Stipulation). The Joint Motion was noticed to all parties. No objections were filed against Commission consideration of the Joint Motion, which led to the Interlocutory Order, dated December 15, 2000

(December 15 Order), granting the Joint Motion. The Joint Motion was supported by evidence from the parties, which was adduced at the Phase I hearings and provided to the Commission.

On March 2, 2001, the Telecommunications Division Administrator issued, under delegated authority, his First Master Test Plan Execution Decision regarding statistical methods and principles. Per the review process provided, AT&T Communications of Wisconsin, Inc. (AT&T), for itself and certain CLECs, petitioned for Commission review of the Administrator's decision. Ameritech replied in opposition. On June 14, 2001, the Commission issued its Interim Order on Statistical Methodology (Statistical Order) affirming the decision of the Administrator. The Commission reserved its right to revisit the order in light of contested issue determinations.

On April 18, 2001, the Commission issued an order (April 18 Order) to commence Phase II testing, as certain components of the test were ready and further delay for issuance of a final decision in this Phase I appeared unwarranted.

Parties briefed the contested hearing issues during January and February 2001. A staff briefing memorandum (with Decision Matrix) was transmitted on May 18, 2001, for parties to comment on the completeness or accuracy of the summary of facts in the briefing memorandum.

On June 13, 2001, the ALJ struck the purported corrections to the briefing memorandum submitted by AW and certain CLECs, with an opportunity to re-submit complying pleadings by June 20, 2001. Both sides submitted

pleadings by the deadline. The ALJ also rejected as potential *ex parte* communications two additional non-record documents proffered for official notice by AT&T and McLeodUSA.

The main parties also reached a stipulation regarding the Change Management Process (Issue V) and filed a request for its inclusion in the record. The ALJ on July 10, 2001, entered an Order to Admit Into the Record Delayed Exhibit 108, which made the matter part of the record for consideration by the Commission.

On July 12, 2001, the Commission held its open meeting discussion regarding the contested issues of UNE-P and EELs offerings, parity with a floor, the change management process for Wisconsin-only OSS issues, and a remedy plan addressing any AW failures to provide adequate and non-discriminatory network access and interconnection.

Subsequent to the open meeting discussion, the Commission determined to act upon a Joint Motion for Amendment of Interlocutory Order, filed by AW and the principal participating CLECs, and dated June 11, 2001. This Joint Motion essentially sought to amend the December 15 Order to attach specified modifications not subject to the briefing in this record. The Commission will deal with this motion in this Phase I Final Decision.

Findings of Fact

1. Ameritech is a public telecommunications utility providing local exchange, intraLATA toll, and other telecommunications services within many major urban areas of Wisconsin. It is an Incumbent Local Exchange Carrier (ILEC) for purposes of the 1996 Act and is a Regional Bell Operating Company (RBOC) subject to § 271 of the 1996 Act for purposes of securing authorization to provide "in-region, interLATA" toll services.

2. It is reasonable and in the public interest, convenience, and necessity to test the OSS of Ameritech to determine whether such systems, in fact, provide reasonably efficient access and provide non-discriminatory levels of performance to Ameritech itself, its affiliates, and competitors seeking use of Ameritech's network by resale or by interconnection or use of UNEs or combinations thereof.

3. It is reasonable to confirm and extend from June 30, 2001, through the conclusion of Phase II of this docket, the retention of Kern & Assoc., Inc., as the facilitator in this docket, pursuant to contract with Ameritech approved by this Commission.

4. It is reasonable and in the public interest, convenience, and necessity to affirm, incorporate by reference, and make final the orders previously issued by the Commission in this docket, which orders were mailed on March 29, 2000; May 3, 2000 (two orders); July 19, 2000; November 29, 2000; December 15, 2000; April 18, 2001; and June 14, 2001.

5. It is reasonable and in the public interest, convenience, and necessity that the Commission reserve to itself sole discretion to determine the extent, nature, and quality (whether objectively or subjectively measured or evaluated) of all features or aspects of the OSS testing.

6. It is reasonable and in the public interest, convenience, and necessity to determine that OSS testing shall test the metrics set forth in the performance measures as supplemented by the eight new performance measures (PMs) and the change identified to PM 70.2, or as revised or set forth in subsequent orders of the Commission.

7. It is reasonable and consistent with the public interest to modify the Master Test Plan (MTP) according to the changes proposed in the Joint Motion filed June 11, 2001, to PMs 1, 2, 4, 55.2, 114.1, 115.1 and 115.2 in the MTP, subject to the condition that proposed amendments not become effective until the parties file with the Commission a fully executed Joint Motion.

8. It is reasonable and in the public interest, convenience, and necessity to adopt the change management process (CMP) set forth in Delayed Exhibit 108 for process changes affecting all 13 SBC states or the five-state Ameritech region, but the Commission finds insufficient record evidence regarding the need for a CMP provision for Wisconsin-only issues.

9. A UNE is a facility or equipment of a telecommunications network, such as a loop or local switching. A network element includes the features, functions, and capabilities of such facilities. For example, databases and information used in transmission or routing

are included within the definition of network elements.[8] The ILECs are required, under state and federal law, to provide UNEs to CLECs. UNEs are to be priced at cost and may include a reasonable profit.[9] The FCC has defined cost in this circumstance as total element long run economic cost (TELRIC).

10. Extended Enhanced Lines (EELs) are combinations of unbundled loops and transport that serve as dedicated circuits or channels between two points. They can act as links between customer premises, and a long distance provider, or a customer and an ISP. The circuits or channels involved are generally higher capacity than typical voice grade service. EELs provide the same functionalities as special access or private line services. Unlike those services, EELs are combinations of UNEs with TELRIC-based prices.

11. UNE-P and EELs are unbundled network elements arranged in combinations that provide local telecommunications services, and therefore provide a form of access service.

12. It is just and reasonable, and in the public interest, convenience, and necessity to order Ameritech to make available EELs (both new and by special circuit conversion) and UNE-Ps (both new and existing combinations) at prices and on such terms and conditions that are reasonable because competition will be enhanced, consumer choices increased, and existing telecommunications facilities will be efficiently utilized.

8/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499 ¶ 249 (1996).

9/ 47 U.S.C. § 252(d)(1).

13. The following terms and conditions in Ameritech's "271 Amendment," or "W2A" offering unreasonably hinder a competitor's ability to make firm, long-term commitments to an interested customer and/or unreasonably coerce a competitor's right to petition the government for redress, including this Commission: declining to offer new combinations, requirement for a separate frame room for UNEs, barring purchase of items from tariffs, limitations on CLEC pick and choose rights under § 251(i), unreasonably short length of term, Ameritech's reservation of the right to withdraw the service when a central office has four or more collocators, and requirements for waivers of a CLEC's right to bring complaints or raise UNE-type issues to regulatory agencies, such as the FCC or the Commission, or to participate in state and federal review of § 271 applications.

14. It is unnecessary and the record is insufficient to change the Commission's current non-regulated treatment of voice mail.

15. The record is insufficient to determine whether Ameritech's operator services/directory assistance (OS/DA) offering complies with applicable FCC regulations to an extent that would permit Ameritech to use market-based pricing for OS/DA.

16. It is reasonable to order Ameritech to implement Carrier Access Billing System Output Specifications (CABS BOS) billing format no later than the date Ameritech has already scheduled for release, October 2001.

17. Current bona fide request (BFR) processes and the facilities modification (FMOD) processes adopted herein

provide adequate processes for CLECs to seek additional capacity from Ameritech.

18. A reasonable remedy plan will encourage Ameritech to provide nondiscriminatory wholesale service comparable to its own retail service and impose a monetary disincentive upon Ameritech if it fails to deliver that quality of service.

19. An appropriately designed remedy plan that accomplishes the goals identified in the preceding paragraph will provide effective enforcement of Ameritech's service quality duties and permit competitors on an ongoing basis to enter and compete in the local telecommunications markets in this state.

20. It is reasonable to base a remedy plan on the performance measurements standards and benchmarks adopted earlier in this docket.

21. All parties agree that there should be a remedy plan.

22. The Ameritech proposed remedy plan is not reasonable because it includes numerous mitigating conditions that effectively deny payment to competitors harmed by discriminatory service.

23. Ameritech's proposed remedy plan fails to provide a sufficient incentive to comply with designated performance standards and is not sufficiently precise and self-executing in its operation to be administered efficiently and to avoid disputes and potential litigation.

24. The CLECs proposed remedy plan is too complex and results in uncertainty regarding what level of remedy payments would actually result from the plan.

25. Neither the plan offered by Ameritech nor that offered by a group of CLECs is reasonable in terms of operation or its likely effects upon enforcement or promotion of market competition. Moreover, the effect of each plan is uncertain because of unnecessary complexity.

26. It is reasonable to use Ameritech's proposed remedy plan as a base because it has been approved by the FCC in other proceedings and is easier to modify to achieve a complete plan without further post-hearing follow-up.

27. In its operational elements, the adopted remedy plan balances competing considerations in a manner that does not permit removal or modifications of one or more parts of the plan and maintaining the remainder.

Conclusions of Law

1. The Commission has jurisdiction under WIS. STAT. §§ 196.02(1), (7), and (12); 196.03(1) and (6); 196.04; 196.199(2); 196.219; 196.26; 196.28; 196.37; 196.395; 196.60; and other provisions of WIS. STAT. chs. 196 and 227 as may be pertinent hereto, and relevant provisions of Wis. Admin. Code chs. PSC 160 and 165, to establish and administer a remedy plan to enforce the quality of OSS for the rendition of adequate, non-discriminatory wholesale services required by reselling and interconnecting carriers, to require Ameritech to make available UNE-P and EELs, as described above, by contract, interconnection agreement procedures under §§ 251 and 252, and tariff offerings

required by law; to require Ameritech to implement CAB BOS billing by October 2001; to determine that current BFR and FMOD processes are adequate to secure additional capacity from Ameritech, to determine that the OSS test shall use parity only and not parity with a floor for performance measure testing, and to act or refrain from acting as set forth in this Final Decision for Phase I of this docket.

2. The Commission has jurisdiction under WIS. STAT. §§ 196.02(1), 196.28, 196.395, and other relevant provisions of WIS. STAT. ch. 196 to order further investigation of Ameritech's OS/DA offering, and to defer action with respect to Wisconsin-only CMP issues.

3. The Commission has jurisdiction under WIS. STAT. §§ 196.02(1), 196.199(2), and other relevant provisions of WIS. STAT. ch. 196 to make findings of fact regarding the reasonableness of terms and conditions in Ameritech's proposed offerings for UNE-Ps and EELs.

4. The Commission has jurisdiction under WIS. STAT. §§ 196.02(1), 196.37, and 196.395, and other relevant provisions of WIS. STAT. ch. 196, to make final the Commission's orders of March 29, May 3 (two orders), July 19, November 29, and December 15, 2000, and of April 18 and June 14, 2001, to conditionally approve the Joint Motion of June 11, 2001, and to ratify and confirm the orders of the administrative law judges respecting the content of the hearing record.

Opinion

General

This proceeding reflects a lengthy process of negotiation and step-by-step decision making by the parties and the Commission. The Commission has entered several orders covering numerous issues as identified in the appendices thereto and the lengthy test materials, all of which are incorporated herein by reference.

The agreements among the parties themselves, and their common representations as recited in the various orders, permit the Commission to conclude that all of the enhancements, improvements, and additions to Ameitech's OSS, plus the testing methods, analyses, and performance measures, are reasonable and will satisfy the criteria of WIS. STAT. § 196.03(6).

Ameritech's OSS should be improved in ways to expedite the offering and delivery of products and services by the CLECs. The negotiated resolution of highly complex and technical issues in a collaborative manner reflects an efficient yet fair reconciliation of competing interests. That kind of solution advances and promotes competition as the means of delivering telecommunications in this state, the principal goal of Act 496.

Consumers would benefit indirectly from the improvement of Ameritech's OSS as used by the CLECs. Insofar as CLEC orders to Ameritech reflect a consumer choice in the new competitive market, an efficient OSS facilitates choice, and reduces barriers to entry in the form of consumer reluctance to endure switchover problems.

Improved OSS means greater efficiency and productivity as both CLEC and Ameritech can maximize the value of computerized interfaces, change systems efficiently, and verify satisfaction of orders more quickly. Thus, at least three key criteria of WIS. STAT. § 196.03(6) are satisfied to permit a finding that the agreed OSS improvements and enhancements, provided they satisfy the third-party test, where applicable, provide reasonably adequate service consistent with the public interest, convenience, and necessity. The other criteria of WIS. STAT. § 196.03(6) are either not relevant or not fully developed on the record so as to outweigh the considerations of promotion of competition, consumer choice, and efficiency and productivity.

The provisions of the interlocutory orders, including amendments thereto, that addressed testing methods and performance measures for the improved OSS are reasonable. Where the parties agreed on a test method or performance measure, they acted as competitors required to make operational sense of the cooperation the 1996 Act and Act 496 enforced upon them. While misjudgments about a future market may occur in this process, the mutual agreements reached implicitly state what works the best for each side under the circumstances. The Commission is in a difficult position because any Commission decision that would overrule such mutual agreement would be, in effect, stating that the Commission has a better knowledge than the competitor about what, at a day-to-day operations level, the competitor needs to succeed in the market place. The Commission sees no evidence, at present, sufficient to justify such an overruling with regard to these issues. The Commission finds nothing in the testing methods or performance measures generally that would contravene competition objectives.

Two particular provisions merit recognition as explicitly pro-competitive. Military style testing and the requirement of satisfaction of exit criteria make sure that minimum standards of non-discriminatory access are achieved for CLEC use. If a particular OSS does not work, it has to be fixed and re-tested until it passes. With the incentive to file a successful § 271 application, Ameritech's interest in effective OSS is also pro-competitive but in relation to the entry into the "in-region" interLATA toll markets. Whatever the incentives, competition is advanced.

UNE-Ps and EELs

This contested issue centers around the requirement of § 251(c)(3) of the 1996 Act that ILECs provide non-discriminatory unbundled access to network elements:

> (3) UNBUNDLED ACCESS – The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service.

47 U.S.C. § 251(c)(3)

UNE-Ps and EELs are specific types of combined network elements. There is little dispute on the record about the definitions of these services.

An unbundled network element is a facility or equipment element of a telecommunications network, such as a loop or local switching. UNEs are to be priced based on costs and may include a reasonable profit. The FCC has defined costs to be used in pricing UNEs as total element long run economic costs (TELRIC). UNE-P is a combination of all the elements that combine to form local voice-grade service.

EELs are combinations of unbundled loops and transport that serve as dedicated circuits or channels between two points. They can act as links between customer premises and along distance provider, or a customer, and an Internet service provider (ISP). The circuits or channels involved are generally higher capacity than typical voice grade service. EELs provide the same functionalities as special access or private line services. Unlike those services, EELs are combinations of UNEs, so prices for EELs are TELRIC based. The parties are in agreement that AW must make available to competitors existing combinations – combinations where the various UNEs that make up UNE-P or EELs are already connected, as in the base of conversion of an existing service. The parties disagree over whether AW can be compelled to offer new combinations of UNEs and UNE-P and EELs.

With respect to new combinations of UNEs combined to form UNE-Ps and EELs, Ameritech argues that its offerings are strictly voluntary, based upon the holding of the Eighth Circuit in *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir.

2000) ("*IUB II*"), *cert. granted*, 121 S. Ct. 877 (2001). The Eighth Circuit Court ruled in *IUB II* that the ILECs were not required by the Act to perform for CLECs the work required to combine elements that were not already combined. Ameritech has interpreted this holding to mean that it only has to offer to CLECs UNE-P for already combined elements. The CLECs have argued that state and federal law permit a state commission to require the offering of new combinations, such as UNE-P and EELs.

The Commission concludes that it has the authority to order Ameritech to offer UNE-Ps and EELs. The Commission is not bound by the language of the Eighth Circuit holding and respectfully disagrees with the court's reasoning. The better construction agrees with the Supreme Court's view of § 251(c)(3) as expressed in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, at 394-395 (1999). Sec. 251(c)(3) does not explicitly prohibit an ILEC from being compelled to combine network elements; the rather ambiguous statutory language at most requires that the ILEC have network elements in a state of readiness to respond to a request for combinations. Who may not, or should not, do the combining is not stated. The 1996 Act has no preemptive effect upon state action on this particular point. *See* § 601(c)(1) (preserving state action against any "implied" preemption by the 1996 Act).

The Commission finds that it may rely upon its state authority in WIS. STAT. §§ 196.02, 196.04, 196.219(3)(a) and (3)(f), 196.219(4)(a), 196.37(2), and 196.199(2) to order Ameritech to offer the services. This state action is protected

as additional, consistent, pro-competitive state action by §§ 251(d)(3),[10] 252(e)(3),[11], and 261(c).[12]

Specifically, the Commission may require Ameritech to offer the services as a general proposition. To the extent that existing interconnection agreements between AW and

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10/ 47 U.S.C. § 251 provides, in relevant part:

> (d)(3) Preservation of State Access Regulations - - -
> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that -
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

11/ 47 U.S.C. § 252 provides, in relevant part:

> (e)(3) Preservation of Authority - - Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate service quality standards or requirements.

12/ 47 U.S.C. § 261 provides in relevant part:

> (c) Additional State requirements
> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

competitors have change of law provisions, the Commission views this Final Decision as establishing a change of law. The services can also be sought in new interconnection agreements under §§ 251 and 252. Lastly, the offerings qualify as unbundled access under WIS. STAT. § 196.01(1b) and must be tariffed by Ameritech pursuant to WIS. STAT. §§ 196.196(2)(a) and 196.219(2m). However, the former statute precludes the Commission from reviewing or setting the rates for intrastate access services otherwise required to be tariffed under WIS. STAT. § 196.219(2m). The Commission is only requiring tariffing of the identified services as required by the statutes; the Commission is not specifying rates, terms, or conditions. Ameritech cites two cases for the proposition that tariffing of interconnection related services is preempted by the 1996 Act. *See Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 809-810 (W.D. MI 2000) and *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1177-78 (D.Or. 1999). The instant order provision is distinguishable because the services together cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether. Furthermore, the 1996 Act's contemplation of tariffing to satisfy SGAT[13] requirements in § 252(f)(1) and the state action protection afforded in §§ 251(d)(3), 252(e)(3), and 261(c) strongly imply that Congress was not generally preempting state power to order tariffing of services otherwise consistent with the 1996 Act.

Many of the terms and conditions Ameritech has proposed on its "voluntary" offerings are simply unreasonable or amount to unacceptable overreaching. They either impede the quality or reliability of the offering, or seek to throttlehold on CLEC participation in regulatory

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13/ "SGAT" denotes Statement of Generally Available Terms.

proceedings. The Commission has ample jurisdiction under WIS. STAT. §§ 196.02(1) and 196.199(2) to declare the provisions unreasonable. The Commission is in effect stating, as an aid to its jurisdiction, it will not accept conditions of the nature stated below when interconnection agreements come before it.

Ameritech's proposed amendment to its interconnection agreements allows CLECs to order new combinations of UNEs as EELs or as UNE-Ps, subject to a number of restrictions. The amendment contains a provision which would terminate the amendment after a set amount of time. (The initial term of the amendment is 18 months from the date of Commission approval, but if the FCC were to approve Ameritech's Section 271 application for Wisconsin within 15 months of Commission approval of the amendment, the Amendment will continue in effect until four years after the date of Commission approval.) Such a time limit would make it difficult for a CLEC to develop a long-term entry strategy using these products, since the CLEC would have no assurance that the products would be available in the future.

The amendment included another provision that would allow AW to eliminate the products for some customers in a given central office, once four competitors have established collocation in that central office. Once again, this would create uncertainty for the competitors.

The AW amendment would also prohibit the competitor from purchasing similar services from tariffs or from opting into similar offerings in other agreements approved under §§ 251 and 252. Such a limitation of competitor's rights to choose among generally available service offerings is

unreasonable. The restriction that would prevent competitors from filing complaints about these services with the state or federal commission is also an unreasonable restriction of the competitors' rights.

Ameritech also proposed that, rather than combining the various UNE elements as it does in its own network, it would extend the elements into a collocation space or "secured frame room" and perform the connections there. The additions and extensions are unnecessary from a technical standpoint, introduce additional costs, and provide additional points of potential failure. All of these factors make new combinations less attractive to competitors and are unreasonable.

Finally, the proposed AW amendment also sought to limit the portability of the offering to other states, but since the orders of this Commission do not affect other states, the Commission makes no finding on that provision.

Apart from WIS. STAT. § 196.199(2), Commission jurisdiction of a price-regulated utility, such as Ameritech, does not generally extend to the price, terms and conditions of an access service by reason of WIS. STAT. § 196.196(2)(a), unless an element of universal service is at issue. No such showing has been made. But tariffing of access services – which UNE-Ps and EELs are by statutory definition – is required of every telecommunications utility under WIS. STAT. § 196.219(2m). Ameritech is directed to comply with that statute with respect to its offering of UNE-Ps and EELs. As noted previously, however, the Commission may not, and is not specifying the tariff rates, terms, and conditions for those offerings. However, compliance with this order for tariffing does require good

faith on the part of Ameritech; it cannot post a price, or impose terms and conditions, so totally unreasonable as to amount to a de facto avoidance of compliance. An unreasonable price, term, or condition is one that is patently obvious to any reasonably well-informed buyer as intended to discourage or prevent the purchase of the service. Having said that, however, the Commission recognizes that, in any challenge to a price, term, or condition, the proponent would have a heavy burden to prove Ameritech's non-compliance with this order.

A related issue raised by the CLECs was their ability to demand additional capacity from Ameritech to meet their unbundling needs. The CLECs contend that the FMOD process should be extended to cover even those larger upgrades subject to the BFR process. The Commission concludes that, on this record, there is no showing that the two processes are insufficient for new competitors to obtain additional capacity from Ameritech for unbundling needs. The Commission, however, will remain ready to review this issue again if problems are identified.

OS/DA, Voice Mail, and CABS BOS

Three miscellaneous items are Ameritech's offering of OS/DA services, the treatment of voice mail, and the provisioning date for the CABS BOS billing system format. Ameritech desired to offer its operator services and directory assistance at market rates because, it asserts, it has deployed customized routing for OS/DA calls in all end offices. Under FCC rules, if customized routing is available, then an ILEC may price OS/DA services at market rates. The CLECs contend that Ameritech has not truly complied with the FCC requirements. The Commission finds the record on

this point is inadequately developed as to technical compliance. The Commission will direct further investigation by staff and require the parties to cooperate in an informal investigation of this question.

The parties argued about the treatment of voice mail as a UNE subject to interconnection. The Commission has for several years treated that service as non-utility merchandising and finds nothing in the record or in the briefs that would justify altering the Commission's current treatment.

The issue of CABS BOS billing format for UNE-P service bills is being superseded by events. Ameritech has proposed to implement the desired billing format no later than its scheduled October, 2001, release date. The CLECs have demanded this format for enhanced ability to audit billings for accuracy. Given Ameritech's resource constraints, the Commission finds that Ameritech's proposed October, 2001, release date is reasonable, and will so order.

Parity With a Floor

The Commission concludes that establishing parity testing with a minimum floor or quality, specifically, the adoption of minimum levels of acceptable performance for twelve performance measures[14] is not necessary or warranted. There is no evidence in this record showing that Ameritech is likely to actively discriminate against a CLEC by providing poor service as to justify the Commission imposing a minimum performance level. Without such evidence, Ameritech is reasonably entitled to a presumption

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14/ See Decision Matrix, p. 13 for list. See Hearing Exhibit 8 for exact description of the PMs sought.

that it will comply with its § 251 duties to provide non-discriminatory interconnection, resale, and unbundled access. If it fails to comply with its duty of non-discrimination, the remedy plan – as designed below – will compel Ameritech to provide compensation. However, the test will provide the raw data that may demonstrate that, though parity is maintained, the service quality is simply unacceptable for wholesale and retail customers alike. In docket 6720-TI-166, Ameritech has recently recommitted itself, per the Commission's order, to improve service quality. The OSS test here will be an indicator of Ameritech's effort; parity with a floor need not be ordered at this time.

Change Management Process

This contested issue was largely resolved by the parties' stipulation entered into the record as Delayed Exhibit 108. The only issue unresolved by the stipulation is that of a change management process (CMP) for Wisconsin-only issues. Upon review of the record, the Commission is unable to determine what Wisconsin-only CMP issues actually remain. The record appears insufficient to render a decision. The Commission, therefore, defers action on this point for treatment if and when a factual situation arises justifying Commission action.

Remedy Plan

The Commission finds it in the public interest and consistent with the criteria in WIS. STAT. § 196.03(6) for the promotion of competition, consumer choice, and efficiency and productivity to order implementation of a Commission Remedy Plan as set forth in Appendix B. All parties agree that a remedy plan should be adopted. The parties, Ameritech and a group of CLECs , respectively, presented their own proposed plans, but failed to make any modifications or suggestions to the plan of the opposing side. The Commission has reviewed these plans in some depth, and finds that neither plan by itself is satisfactory. The Ameritech plan contains too many mitigation conditions that in the ultimate analysis effectively reduce its payments for discriminatory treatment. The CLEC plan is too complex and still requires some additional work to know what kind of financial impact it could create.

The FCC articulated several factors that would describe a performance assurance plan for purposes of securing § 271 relief:

> "*potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
>
> *clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
>
> *a reasonable structure that is designed to detect and sanction poor performance when it occurs;

*a self-executing mechanism that does not leave the door open unreasonable to litigation and appeal;

*and reasonable assurances that the reported data is accurate."

In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, 15 F.C.C.R. 3953, 4167, ¶ 433 (1999). The Commission concludes that its own proposed remedy plan, modified substantially from the Ameritech proposed plan, makes changes that are directed toward meeting the foregoing criteria, as discussed in detail below. The Commission's final plan design reflects a balancing that cannot be tinkered with or undone without disrupting the plan's effective operation.

One of the major differences between the Ameritech plan and the CLEC plan is the method of determining the critical value (the key point of statistical comparison for determining whether discrimination exits or not). Both plans apply statistical principles to determine whether differences in performance are due to random chance or whether actual discriminatory actions have occurred. The Ameritech plan determines the critical value based on a 95 percent confidence level. This confidence level limits the chance of the type of error in which discrimination is found when none exists (a false positive, Type I error) to 5 percent. The CLEC plan incorporates a greater emphasis on the likelihood that discrimination will exist but the statistical test will fail to detect it (a false negative or Type II error).

However, according to Ameritech's calculations, the CLEC plan could result in remedy payments of $8 million per month even when Ameritech is providing services that are in parity. This is close to the maximum payment under plan of $8.75 million per month. The magnitude of the remedy payments under the CLEC plan may, in part, be due to its method of handling small numbers of transactions. Based on September 2000 data, over 50 percent of the parity tests had ten or less CLEC observations and over 70 percent had less than 30 observations.

The Commission recognizes that there are public policy implications for both Type I and Type II errors. With a Type I error, Ameritech would be forced to pay remediation even though it is competing fairly. With a Type II error, Ameritech would be hurting competition through discriminatory treatment of competitors while avoiding payment. In this decision, the Commission balances these policy implications by choosing a high level of certainty in its determination that discrimination exists and balances that with significant, swift, self-executing remedy payments when such a determination is reached.

This decision is also reflected in another significant modification to the Ameritech plan. The Commission determined that it is reasonable to modify the method for determining remedy payments once discrimination had been detected. Remedy payments under the Ameritech plan are based on a per occurrence calculation except for a few measures that are computed on a per measure basis.[15]

15/ The CLEC plan provides the same level of remedy payment to any CLEC that suffered discrimination regardless of the actual volume of transactions that the CLEC actually conducts with Ameritech. The Commission rejects this approach.

However, the Ameritech plan includes a further calculation to determine the number of occurrences upon which remedy payments are made that effectively reduces its payments for discriminatory service.[16]

The Commission finds that once it has been determined at a 95 percent confidence level that discrimination has occurred, every transaction that a CLEC conducted with Ameritech that was included in that measure of performance should be subject to remedy payments. Reaching a finding that discrimination has occurred means that the very process Ameritech uses for providing service to the CLEC must be discriminatory. Accordingly, it is reasonable for a plan to make remedy payments on all transactions that were subjected to that discriminatory process. All transactions, which were subjected to that discriminatory process, consist of all transactions that were included in that measure of performance that was found to be discriminatory. This modification to the Ameritech plan is expected to increase the level and certainty of remedy payments.

Other modifications to the Ameritech plan that the Commission determines are reasonable should also increase the amount and certainty of remedy payment once discrimination has been detected. These include: requiring permutation tests to be used for small sample sizes, eliminating the forgiveness factor (K-factor), computing payments based on a comparison to Ameritech affiliate data in addition to Ameritech retail data, and eliminating all grace periods. The Commission also has additional modifications described below that further simplify the plan and increase

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16/ Exhibit 23 demonstrates this effect.

the degree to which remedy payments will be swift and self-executing.

The Commission has incorporated its revisions into the Ameritech plan to create the Commission Remedy Plan included as Appendix B. The Commission has determined that its Remedy Plan as set forth in Appendix B represents a middle ground, balancing many factors which cannot be be undone without disturbing the fundamental basis of unanimity of the Commissioners. The Commission finds that its plan will be simpler to administer, will detect discrimination with a high degree of certainty, will require monetary assessments on all transactions that were subject to a discriminatory process, and will require remedy payments to be swift and self-executing. Simplicity is important in order to make the requirements that need to be met clear, and make the ramifications readily known if the requirements are not met. The Commission may need to further evaluate its plan, once it gains experience with it, to determine whether the plan will meet its criteria and the FCC's criteria for an effective remedy plan. The Ameritech plan provides an adequate basis upon which to build a simpler plan, and the Commission proceeds accordingly to make the following modifications to design its own Remedy Plan:

1. Benchmark performance measures shall not have statistical tests applied, but instead shall be treated as minimum performance standards. Those benchmarks are set at less than 100 percent, which leaves sufficient flexibility for the random errors that are addressed by the statistical tests applied to parity standards.

2. A 95 percent confidence level shall be used to determine the existence of discrimination as described

above. In addition, permutation tests shall be used when the number of transactions subject to a performance measure in a month is less than 30. Permutation tests are a valid statistical method for such small samples. The statistical tests included in the Ameritech plan for large sample sizes may not provide valid results when sample sizes are less than 30 transactions. The Ameritech plan allowed Ameritech the option of using permutation tests but did not require their use.

3. There shall not be a forgiveness factor. The Ameritech plan contained a K-factor that would forgive the number of disparate tests that would be expected to occur even when parity of service exists. By eliminating the forgiveness factor, the Type I and Type II errors are balanced through the use of a 95 percent confidence level in statistical testing.

4. The Commission shall retain Ameritech's additional remedies for nascent and advanced services. This triples the payment for remedies on certain measures for competition-affecting discrimination. Competition-affecting Tier II payments shall be paid to the Gifts and Grants Fund of the Public Service Commission. The Commission does not adopt the CLEC plan that increased Tier II payments based on market share lost by Ameritech.

5. Both a comparison to affiliate performance and Ameritech retail performance shall be subject to remedy payments. Both state and federal statutes require that Ameritech not discriminate in its own favor or in favor of a subsidiary or affiliate. Detecting favoritism is as important for an affiliate as it is for Ameritech's own retail customers. There are two opportunities for discrimination, so it is

reasonable that there are two opportunities for remedy payments.

6. Remedy payments shall be computed on a per occurrence basis as described above. The Commission adopts the Ameritech plan providing escalation in the size of remedy payments based on chronic poor performance.

7. There shall be no grace period before remedy payments begin. The Ameritech plan included a three-month grace period before the payment of Tier II remedy payments and a six-month in one year requirement before additional remedy payments were required associated with nascent and advance services. These terms also had the effect of paying remedies on only one month of discriminatory performance instead of the full three or six months of discriminatory performance. All of these time limitations shall be eliminated from the Ameritech plan. This will increase the swiftness with which remedy payments are made once discrimination has been detected. It will also require payment for all months of discriminatory performance.

8. The Ameritech plan did not include an inflation adjustment and the Commission will not add an inflation adjustment as proposed by the CLECs. The payment levels should be reviewed periodically to determine if it provides a potential liability that provides a meaningful incentive to comply with the designated performance standards.

9. Performance measures should not be classified as high, medium or low. The payment level identified as low in the Ameritech plan shall be the payment level in the Commission plan. The Commission does not accept Ameritech's concept that every performance measure falls

neatly into a "high," "medium," or "low" priorities for remedy purposes. Ameritech should not be able to substitute its judgment for the business plans of the CLECs. The lower level of payment is selected in light of the increased number of occurrences to which the remedy payment will be applicable.

10. Ameritech shall file an "incident" report that documents all corrected reports, missing change management notices, or unauthorized noticed changes. The CLECs had proposed additional remedy payments for these types of failures. In all other respects, the additional remedy payments related to reporting or payment failures as included in the Ameritech plan shall apply.

11. The Commission adopts the caps as proposed in the Ameritech plan. Ameritech's liability under the remedy plan shall be limited to 36 percent of net return as defined in the Ameritech plan. This amounts to $105 million annually based on the most recent data on the record. There shall be additional caps per measure and per CLEC. The annual cap shall be divided by 12 to establish a monthly cap. When a cap is reached, Ameritech shall pay the balance of the payment into an escrow account until the completion of a show causing proceeding. The Commission accepts this level of payment as proposed by Ameritech as a reasonable maximum liability on self-executing payments. Any greater level of payments should be determined in a further proceeding.

12. Ameritech shall be required to first prove to the Commission that there has been bad faith on the part of a CLEC or other reasonable cause before Ameritech can withhold any remedy payments. The provision in

Ameritech's plan that would allow it to withhold payments essentially eviscerates the self-executing mechanism of the plan.

13. The remedy plan payments shall not affect any civil or contract remedies or rights of the CLECs. The remedy plan shall not estop other types of actions or be an alternative to them.

14. Tier II competition-affecting remedy payments shall be paid to the Gifts and Grants Fund of the Public Service Commission. This money can then be used to benefit telecommunications consumers. The Ameritech plan included making these payments to the State of Wisconsin.

15. Changes to the Remedy Plan shall be made by Commission action. The Ameritech plan included an automatic reduction in the number of performance measures subject to remedies. The need for and amount of remedies shall be determined by the Commission considering the extent of competition in telecommunications markets and various sectors of these markets.

16. Ameritech shall be required to provide for an independent annual audit of the accuracy of its performance measurement data and the resulting remedy payments with the cost of the audit to be paid by Ameritech. CLECs shall be provided access to the raw performance data in a manner that does not reveal any competitors' names. Ameritech has sole control over the accuracy of its data collection systems, so it is reasonable to incorporate a mechanism to ensure the data provided is accurate. By providing CLECs access to the raw data, CLECs can recalculate remedy payments and,

additionally, propose modifications to remedy plans that would advance competition.

17. The Commission Remedy Plan has no predetermined termination date. Again, the need for and amount of remedies shall be determined by the Commission considering the extent of competition in telecommunications markets and various sectors of these markets.

18. The Commission Remedy Plan shall be made immediately available through amendments to interconnection agreements. This Remedy Plan is the Commission's Remedy Plan and is made available through the Commission. This Remedy Plan is not contingent upon any other term in an interconnection agreement. As the Commission Remedy Plan is attached here, see Appendix B, there is no need for any interim remedy plan.

19. Remedy payments shall be made via separate check. The Ameritech plan provided for bill credits. Bill credits for remedy payments as proposed by Ameritech could create liquidity issues for CLECs.

20. For all other terms, the Commission shall use the Ameritech plan.

The Commission has the jurisdiction to order this Remedy Plan under WIS. STAT. §§ 196.219(3)(c) and (4)(a), and 196.37(2). The remedy plan constitutes an enforcement measure to assure the service quality mandated by subs. (3)(c). The particular measure of a remedy plan is permitted by WIS. STAT. § 196.37(2) in the form of a directing order. Funds required to be paid by Ameritech under Tier II provisions shall be paid into the Commission

under its gifts and grants authority, WIS. STAT. § 20.155(1)(Lm), which provides for receipt of "settlements."

Order

1. This order is effective upon mailing.

2. The Commission hereby confirms and makes final its interlocutory orders, and amendments thereto, as described above. Only matters therein of a procedural nature that have been superseded by time, shall be considered obsolete. All substantive matters are deemed carried forward, and any dispute about whether a matter has been made final or remains applicable shall be brought directly to the Commission by motion served upon all parties to this proceeding.

3. OSS testing shall continue in compliance with the MTP and PMs, as modified herein. Any process between parties that is set forth in a resolved issue in any interim order made final herein shall continue as provided in such order unless manifestly superseded by the MTP or th PMs or a specific ordering provision herein.

4. As described hereinabove, Ameritech shall forthwith proceed to offer current and new combinations of both UNE-Ps and EELs in interconnection agreements and related negotiations consistent with federal law, and tariff the offerings as required by the provisions of WIS. STAT. §§ 196.196(2)(a) and 196.219(2m).

5. Parties shall cooperate with the Commission's investigation into whether Ameritech's OS/DA offerings

comply with applicable FCC regulations respecting the right to offer OS/DA on a market-priced basis.

6. Ameritech shall implement the CABS BOS billing format by the proposed October, 2001, release date.

7. The Remedy Plan in Appendix B, be, and is hereby, adopted effective as of the first day of the first full calendar month of activity following the issuance of this order.

Dated at Madison, Wisconsin, _____

By the Commission:

/s/ Lynda L. Dorr
Lynda L. Dorr
Secretary to the Commission

See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Appendix F

ORDER DENYING REHEARING and CORRECTIONS TO FINAL DECISION (Phase I) BEFORE THE PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation Into Ameritech Wisconsin Operational Support Systems

No. 6720-TI-160

ORDER DENYING REHEARING and CORRECTIONS TO FINAL DECISION (Phase I)

Date Mailed: November 14, 2001

The Commission on September 25, 2001, issued its Final Decision (Phase I) in the above-captioned proceeding. On October 15, 2001, Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin (Ameritech) filed a Petition for Reconsideration and Clarification (Petition). Ameritech supplemented the filing with additional legal authorities on October 24, 2001. The Commission received a Response to the Petition on October 30, 2001, from AT&T Communications of Wisconsin, Inc. and TCG Milwaukee (d/b/a AT&T Local Services), KMC Telecom, Inc., TDS Metrocom, Inc., McLeodUSA Telecommunications Services, Inc., Time Warner Telecom, L.P., and WorldCom, Inc. (collectively, "CLECs"). Staff prepared a memorandum dated November 1, 2001, that reviewed and analyzed the pleadings and set forth suggested technical changes prompted by the Petition and the Response. The Commission discussed the foregoing at its open meeting of November 8, 2001.

Rehearing

Ameritech challenged the Final Decision (Phase I) (Final Decision) in five respects: (1) the "all transactions" remedy plan was poor public policy, an impermissible "penalty plan," and a penalty plan that through elimination of the K-table penalized compliant performance; (2) a self-executing remedy plan is unauthorized by law; (3) the remedy plan is structurally preempted by the Telecommunications Act of 1996 (Act);[1] and may only be adopted by negotiated addition to interconnection agreements, subject to certain clarifications of the plan; (4) the Commission decision is without substantial record evidence and follows inadequate notice of the Commission's potential adoption of its own plan; and (5) neither state nor federal law permit the Commission to require Ameritech to offer new combinations of unbundled network element platforms (UNE-Ps) or extended enhanced links (EELs).

The CLECs filed an extensive Response to each argument, essentially stating that the Commission's Final Decision was correct. The CLECs, however, agreed with Ameritech's request for an expedited remedy payment waiver process in the event a CLEC was shown to have acted in "bad faith." The CLECs did not oppose or comment on Ameritech's request for a clarification of the beginning and ending dates for the six-month review process and an apparent problem in wording the payment liability for non-compliant affiliate transactions.

1/ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at scattered sections of Title 47 United States Code).

Staff analysis suggested that some technical corrections responding to Ameritech's concerns and other minor changes were warranted, as discussed in the next section.

With respect to the Petition, the Commission has determined, notwithstanding the pleading's caption, to treat it as a petition for rehearing under WIS. STAT. § 227.49. The standards for grant of rehearing require demonstration of a material error of law or fact or the discovery of new evidence that could not have been previously discovered upon the exercise of due diligence and which would strongly suggest that the initial decision would be modified or reversed.

The Commission concludes that Ameritech has not satisfied the criteria under WIS. STAT. § 227.49 for grant of rehearing of a final agency decision. The Commission's Performance Remedy Plan is not reasonably open to modification of just one part. The Plan had been designed as an integrated whole to give incentive to Ameritech to improve its operational support systems (OSS) so as to provide quality, non-discriminatory service to its competitors, rather than perform in a way that makes performance payments merely a cost of doing business. Ameritech is fully open to controlling its liability under the remedy plan by making OSS changes that assures it tests out as "compliant" on the performance measures. If the OSS of Ameritech is reasonably adequate, it will not be liable for remedy assessments.

The Commission does not find itself preempted from creating a remedy plan. The Commission finds it has a "shared jurisdiction" in the matter of a remedy plan insofar as it may relate to matters considered in an Ameritech

interLATA authorization application to the Federal Communications Commission (FCC) under 47 U.S.C. § 271. The Commission has ample state law authority to institute a remedy plan that enforces the duty of service quality owed by Ameritech to its customers, both end-users or other telecommunications providers. *See, e.g.*, WIS. STAT. § 196.219(3)(c) and (4)(a). Federal law protects this additional necessary action under 47 U.S.C. §§ 253(b) and 261(c), to name a few relevant federal statutes.

Ameritech was not denied due process. Ameritech and the CLECs participated in numerous prehearing conferences (often referred to as "collaboratives") to narrow the issues and define those that would be subject to formal hearing. The record is substantial as to the remedy plans, their components and the effects of various features. All of the parties were on notice that the nature of any remedy plan was at issue from the first issue list. In the final listing of issues for post hearing briefing, the Administrative Law Judge specifically identified the potential for the Commission to adopt a plan of its own design. If any party disagreed with that characterization of the issue, it was obliged to object. Ameritech made no objection. It cannot be heard to have had no notice that the Commission might develop its own plan from the technical and voluminous party evidence as to useful plan designs and features.

In the matter of requiring new combinations of UNE-Ps and EELs, the Commission acknowledges that the law is fluid at this point, given pending appeals, but cannot find any legal argument demonstrating a material error of law. State law, especially the provisions of WIS. STAT. §§ 196.219 and 196.37(2), provide the Commission with jurisdiction to go beyond federal minimums and require the offering of

telecommunications services that are intended to advance competition in the local exchange markets.

In light of the foregoing, the Commission concludes that Ameritech has not satisfied the standards of WIS. STAT. § 227.49(2) for a grant of a rehearing petition. Any arguments not specifically mentioned herein were also considered and are deemed inadequate to justify rehearing.

Technical Corrections

The pleadings prompted investigation of flaws in this complex and lengthy Final Decision, which includes incorporation of numerous interlocutory orders with attached materials. Staff identified four areas in which technical corrections should be applied to the Final Decision to cure technical omissions and to clarify the operation of the Performance Remedy Plan without altering its substantive effects.

The customary recitation of the material events in the proceeding inadvertently excludes recognition of the November 29, 2000, interlocutory order, although it was formally adopted in the Final Decision. The following paragraph should be treated as inserted as new first full paragraph on page 5 of the Final Decision (Phase I) order:

> "On November 29, 2000, the Commission issued an Order that addressed matters covered by the Temporary ALJ's Second Report. On an interlocutory basis, the Commission adopted, as resolved, the issues covered by Attachment E to the Second Report, and adopted the resolution of performance measures in Attachments F and G. The Commission deferred action on the

Temporary ALJ's September 25, 2000, Proposed Decision. The Commission adopted the Master Test Plan (MTP), Version 2.0, in Attachment J, delegated routine MTP matters to the Telecommunications Division Administrator, adopted a dispute resolution procedure (Appendix A to the November 29, 2000, Order), and retained the facilitator for a further period running to June 30, 2001."

The Commission agrees with Ameritech's concerns that an expedited remedy payment waiver process was a plan component inadvertently omitted when the Commission used Ameritech's remedy plan as a functional base for design of its own plan. The Commission believes that the above referenced dispute resolution procedure (identified in the above insert) satisfies Ameritech's concerns, especially as it uses informal procedures and then, as needed a more formal, expedited process for an initial Commission determination within 70 to 85 days, depending upon whether a hearing is held. Accordingly, the following paragraph is added as a new Paragraph 7.2 in the Performance Remedy Plan and present Paragraphs 7.2 and 7.3 therein are renumbered as 7.3 and 7.4, respectively.

"All remedy payments under this Performance Remedy Plan are subject to the condition that transactions were not initiated in bad faith, and that a CLEC receiving a payment under this Plan is liable to repay Ameritech if the Commission determines that a CLEC was in bad faith in triggering Ameritech liability hereunder. The Commission may order repayment with interest. Ameritech may use the Dispute Resolution Procedure if it believes it has other reasonable cause why payments under the Plan should not be made. For purposes of this

paragraph, the Dispute Resolution Procedures (Appendix A to the November 29, 2000, Order) shall be used and are modified when used under this provision to reflect that Ameritech may be treated in lieu of a CLEC as the initiating party in the dispute resolution procedure, and that notice to the opposing CLEC for purposes of para. 2.2.3 shall be given to the legal department of a CLEC's headquarters."

In a third matter, Ameritech appropriately pointed out that the six-month review process for the Master Test Plan, as adopted from Attachment G in the Temporary ALJ's Second Report, as approved by the November 29, 2000, Order, is not sufficiently clear. Ameritech proposes, and the CLECs do not object, that the six-month interval should commence upon the Commission order concluding a six-month review process. The following two changes implement the correction:

1. A footnote is hereby inserted immediately after "including amendments thereto," in the first sentence of the first full paragraph on page 14 in the Opinion section of the Final Decision:

"Included in the Commission's determination to clarify the intervals used in the six-month review processes discussed in Attachment G to the Temporary ALJ's Second Report, approved in the interlocutory order dated November 29, 2000."

2. A new paragraph is added to Order Paragraph 2, on page 30 of the Final Decision:

"For purposes of benchmarking the six-month review process adopted in the November 29, 2000, Order, the parties shall mutually identify and agree upon the commencement date of any six-month review process currently in progress, and file with the Commission no later than December 15, 2001, a joint letter identifying the mutually agreed and understood initiation date of the pending six-month review process. Upon the Commission's issuing an order concluding the pending six-month review process, the next six-month review process shall commence six-months from the mailing date of that Commission order. If no review process is pending, then the next six-month review process shall commence no later than March 25, 2002."

In the Performance Remedy Plan (Appendix B to Final Decision), additional corrections are necessary. The first two correct typographical and identification errors, while the last two changes clarify the intended operation of the Performance Remedy Plan as to application of the cap and the treatment of payments with respect to Ameritech's affiliate shown in test results as receiving favorable discriminatory treatment.

1. In Performance Remedy Plan Para. 3.0, the third definitional line regarding the Z test shall read as follows:

"MILEC AFFILIATE = ILEC AFFILIATE Average."

2. In the fourth sentence of Performance Remedy Plan Para. 7.1.1, the phrase "Public Service Commission's" should be inserted in front of "Procedural Rules." This change will clarify the sentenced rules.

3. To clarify the operation of the cap on assessments in a manner consistent with the intention of the Final Decision not to alter existing interconnection agreements, the following underscored additions and text deletions are made to Para. 7.1 and Para. 7.3 (now renumbered 7.4):

> 7.1 Ameritech Wisconsin and CLEC agree that a maximum annual cap of $105.754 million will apply to the aggregate total of any Tier-1 assessments ~~(including any such amounts paid pursuant to this Agreement or to any other Wisconsin interconnection agreement with a CLEC)~~ and Tier-2 assessments or voluntary payments made by Ameritech under this Performance Remedy Plan (regardless of whether the Plan may be applied through an Ameritech Wisconsin interconnection agreement or tariff ~~pursuant to any Wisconsin interconnection agreement with a performance remedy plan~~. The annual cap amounts will be determined by Ameritech, based on the formula of 36% of Net Return as set forth at ¶ 436 and footnote 1332 of the FCC's December 22, 1999 Memorandum Opinion and Order in CC Docket No. 99-295. Once the annual cap is established, a monthly cap will be determined by dividing the amount of the annual cap by twelve. A maximum monthly cap of $ 8.128 million ($105.754 million ÷ 12) for Tier-1 and Tier-2 Assessments will apply to all performance payments made by Ameritech under this Performance Remedy Plan (regardless of whether the Plan may be applied through an Ameritech Wisconsin interconnection agreement or tariff) ~~all Ameritech Wisconsin interconnection agreements~~ equals or exceeds the annual cap, but Ameritech has paid less than that amount due to the monthly cap, Ameritech shall be required to pay an amount equal to the

difference between the annual cap and the amount paid. In such event, Tier-1 assessments shall be paid first on a pro rata basis to CLECs, and any remainder within the annual cap shall be paid as a Tier-2 assessment. In the event the total calculated amount of assessments for the year is less than the annual cap, Ameritech shall be obligated to pay ONLY the actual calculated amount of assessments. The annual cap shall be re-calculated on the first business day of the calendar year that updated ARMIS data is made publicly available. For purposes of applying the cap, the calendar year shall apply.

7.4 "In the event the aggregate total of Tier-1 and Tier-2 assessments under this Performance Remedy Plan (whether the Plan is applied through an Ameritech Wisconsin interconnection agreement or tariff) ~~all Ameritech Wisconsin interconnection agreements and tariffs~~ reaches the annual cap within a given year and Ameritech continues to deliver non-compliant performance during the same year to any CLEC or all CLECs, the Commission may recommend to the FCC that Ameritech should cease offering in-region interLATA services to new customers."

4. Para. 11.1.1 of the Performance Remedy Plan shall be clarified to read as follows:

"An 'occurrence' is defined to mean a transaction of a CLEC in a sub-measure that is found to be non-compliant in a month pursuant to the criteria in sections 3.0 and 4.0 above. 'All occurrences' means all transactions for a month for a non-compliant sub-measure. For example, if the sub-measure POTs Mean Installation Interval is found to be non-compliant in a

month, then every transaction in that month for which the POTs Mean Installation Interval is measured is an 'occurrence.'"

"'Occurrences' include the sum of both sub-measures that compare Ameritech retail performance to CLEC performance and sub-measures that compare Ameritech affiliate performance to CLEC performance. The same transaction can be counted as two occurrences if both the Ameritech retail sub-measure and the Ameritech affiliate sub-measure are found to be non-compliant. If the Ameritech retail sub-measure is compliant while the Ameritech affiliate sub-measure is non-compliant or vice versa, the transaction is counted as only one occurrence."

The corrections herein are intended to better reflect the Final Decision's stated objectives respecting operation of the Performance Remedy Plan. This order shall be effective immediately. The Commission has jurisdiction to enter this order under WIS. STAT. §§ 196.02, 196.03(1) and (6), 196.04, 196.199, 196.219, 196.37(2), 196.39, 227.49(5), other provisions of WIS. STAT. chs. 196 and 227, as may be pertinent hereto, and, as applicable, provisions of 47 U.S.C. §§ 251, 252, 253, 261, 271 and relevant FCC regulations.

Dated at Madison, Wisconsin, November 14, 2001

By the Commission:

/s/ Lynda L. Dorr
Lynda L. Dorr
Secretary to the Commission
See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in WIS. STAT. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in WIS. STAT. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in WIS. STAT. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with WIS. STAT. 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Appendix G

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

The Supremacy Clause, U.S. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

Title 47 - Telegraphs, telephones, and radiotelegraphs
Chapter 5 - Wire or radio communication; general provisions

Subchapter I – General Provisions

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of

telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

* * * *

(d) Implementation

* * * *

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

* * * *

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any

documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of

this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of

transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State

commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

* * * *

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

* * * *

§ 261. Effect on other requirements

* * * *

(c) Additional State requirements

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

* * * *

Section 601 of the Telecommunications Act of 1996

§ 601. Applicability of Consent Decrees and Other Law.

* * * *

(c) Federal, State and local law

(1) No Implied Effect. — This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local claw unless expressly so provided in such Act or amendments.

WISCONSIN STATUTES

Chapter 196. Regulation Of Public Utilities

196. Telecommunications utility price regulation

* * * *

196.01. Definitions

As used in this chapter and ch. 197, unless the context requires otherwise:

(1b) "Access service" means the provisions of switched or dedicated access to a local exchange network for the purpose of switched or dedicated access to a local exchange network for the purpose of enabling a telecommunications provider to originate or terminate telecommunications service. "Access service" includes unbundled local service provided to telecommunications providers.

* * * *

196.04. Facilities granted other utilities; physical telecommunications connections; petition; investigation.

* * * *

(1)(b)2 Every telecommunications utility shall permit physical connections to be made, and telecommunications service to be furnished, between any telecommunications system operated by it and the telecommunications toll line operated by another telecommunications provider, or between its toll line and the telecommunications system of another telecommunications provider, or between its toll line and the toll line of another telecommunications provider, or between its telecommunications system and the telecommunications system of another telecommunications provider if all of the following apply:

a. Public convenience and necessity require the connection.

b. The connection will not result in irreparable injury to the owners or other users of the facilities of the public utility making the connection.

* * * *

196.196 Telecommunications utility price regulation

* * * *

(2) Price regulation of intrastate access services. (a) Except as required to enforce this subsection, the commission may not review or set the rates for intrastate access services offered by price-regulated telecommunications utilities. This

paragraph does not waive the tariff requirements of s. 196.219 (2m).

* * * *

196.199. Interconnection agreements

* * * *

(2) Commission powers. (a) The Commission has jurisdiction to approve and enforce interconnection agreements and may do all things necessary and convenient to its jurisdiction.

* * * *

§ 196.219. Protection of telecommunications consumers

* * * *

(2m) Access services. A telecommunications utility or provider shall provide access services under tariff under the same rates, terms and conditions to all telecommunications providers, except that a provider is not obligated to provide to competitors access to dedicated access services provided to end user customers as part of an interexchange service.

(3) Prohibited practices. A telecommunications utility with respect to its regulated services or any other telecommunications provider with respect to its offering of local exchange services may not do any of the following:

(a) Refuse to interconnect within a reasonable time with another person to the same extent that the federal

communications commission requires the telecommunications utility or provider to interconnect. The public service commission may require additional interconnection based on a determination, following notice and opportunity for hearing, that additional interconnection is in the public interest and is consistent with the factors under s. 196.03(6)

* * * *

FEDERAL REGULATIONS

Title 47—Telecommunication
Chapter I—Federal Communications Commission
Subchapter B—Common Carrier Services
Part 51—Interconnection
Subpart D—Additional Obligations Of Incumbent Local Exchange Carriers

Current through October 1, 2003; 68 FR 56764

(c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:

* * * *

(8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:

* * * *

(ii) Refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration.

Supreme Court, U.S.
FILED
DEC 5 - 2003
OFFICE OF THE CLERK

Nos. 03-603 & 03-656

In the Supreme Court of the United States

AVE M. BIE, BURNEATTA BRIDGE, AND ROBERT M. GARVIN, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN, IN THEIR OFFICIAL CAPACITIES,
AND
WORLDCOM, INC.,

Petitioners,

V.

WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN IN OPPOSITION

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QUESTION PRESENTED

Whether the detailed procedures mandated by Congress for implementing interconnection obligations between competing telephone carriers via interconnection agreements formed by negotiation, arbitration, state commission approval, and federal court review preempt a state commission order imposing significant new interconnection and access obligations by an alternative method that bypasses those federal procedures.

RULE 29.6 STATEMENT

Respondent Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("SBC") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

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BRIEF FOR WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. This case concerns the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). The Act establishes a "new *federal* regime" that "fundamentally restructures local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 379 n.6 (1999) (emphasis in original). Under this regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal standards created by the Act. *Id.* at 377-378 & n.5. As this Court has explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6.

B. Interconnection Agreements. The key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252. Rather than rely on the historical regime of tariffing, Congress enacted these sections to establish carrier-to-carrier "interconnection agreements" as the federally mandated vehicles for implementing the market-opening duties set forth in section 251 of the Act. See *Iowa Utils. Bd.*, 525 U.S. at 371; see generally 47 U.S.C. §§ 251(b)-(c). Section 251(c)(3) of the Act requires an incumbent local exchange carrier ("LEC") like SBC to provide "access to network elements on an unbundled basis * * * in accordance with the terms and conditions of [its interconnection] agreement and the requirements of [section 251] and section 252." 47 U.S.C. § 251(c)(3).

The section 252 process involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) federal court review. At every stage of the process, federal law sets the pertinent standards.

In accordance with Congress's goal of creating a "de-regulatory" framework for local competition (see H.R. Conf. Rep. No. 104-458, at 113 (1996)), the Act makes interconnection a matter of private negotiation. At the beginning of the process, a competing LEC asks the incumbent LEC to negotiate an interconnection agreement. 47 U.S.C. § 252(a)(1). Both parties must "negotiate in good faith." *Id.* § 251(c)(1). The Act provides that "an incumbent [LEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). This right to conclude an agreement that does "not conform to all the detailed, specific requirements of § 251" reflects the Act's "clear preference" for "negotiated agreements" and "bestows a benefit to those carriers able to resolve issues through negotiation and compromise." *MCI Telecommunications Corp.* v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001), cert. denied, 537 U.S. 941 (2002); see also *Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., concurring in part and dissenting in part) ("[s]ection 252 sets up a preference for negotiated interconnection agreements"); *Verizon North, Inc.* v. *Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("private negotiation * * * is the centerpiece of the Act"), cert. denied, 123 S. Ct. 1649 (2003).

If the negotiation process does not produce a complete interconnection agreement, either party may (during a specified period) ask the state commission to arbitrate "open issues." 47 U.S.C. § 252(b). And the Act provides procedural and substantive guidelines governing arbitration. 47 U.S.C. §§ 252(b)-(d).

Following negotiation and arbitration, the parties must submit to the state commission any agreement they reach. 47 U.S.C. § 252(e)(1). The Act authorizes the state commission to "approve or reject the agreement" (*ibid.*), and provides specific "grounds for rejection" that vary depending on whether the agreement (or portion thereof) was adopted by negotiation or arbitration (*id.* § 252(e)(2)).

At the conclusion of the negotiation, arbitration, and approval process, the Act provides for federal court review of the state commission's determinations to ensure that they "meet[] the requirements of" sections 251 and 252. 47 U.S.C. § 252(e)(6). The Act also states that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 47 U.S.C. § 252(e)(4). Thus, "subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place," and under that scheme "federal district courts have exclusive jurisdiction to review FCC or state commission actions relating to interconnection agreements." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 329 (7th Cir. 2000), cert. denied, 531 U.S. 1132 (2001).

C. The Proceedings Below. On September 25, 2001, the Public Service Commission of Wisconsin ("PSCW" or "Commission") issued a Final Decision in which it ordered SBC to provide new combinations of network elements — including the "unbundled network element platform" or "UNE-P" — to competing LECs and to make those new combinations available "as a general proposition" through tariffs filed with the Commission. See Pet. App. 56a.[1] SBC

[1] "Pet. App." refers to the appendix to WorldCom's petition for certiorari (No. 03-603).

subsequently filed a petition for rehearing, which the Commission denied on November 14, 2001. *Id.* at 76a.

UNE-P is the "combination of several network elements that collectively permit the requesting competing carrier to provide traditional local voice telephone service." WorldCom Pet. 10. Using UNE-P, a competitor can lease at extremely low prices *all* elements of the network necessary to provide local service, and can thus re-sell SBC's local service. UNE-P is the primary means by which many of SBC's largest competitors — including WorldCom and AT&T — have chosen to compete with SBC. The Commission's order requires SBC to provide UNE-P, and allows competitors to demand UNE-P, without any negotiation, mediation, arbitration, or federal court review of the applicable prices, terms, and conditions, and indeed without any interconnection agreement provisions governing UNE-P at all. Instead, the Commission's order requires SBC to adhere, upon a competitor's demand, to a tariff composed of state-determined UNE-P terms and conditions.

SBC filed a complaint alleging that the Commission's order violated federal law by requiring that SBC provide those new combinations through a state tariff. The district court granted relief on the ground that the Commission's order "is inconsistent with and preempted by § 252 of the Telecommunications Act." Pet. App. 34a.

The district court explained that "Congress gave sweeping authority to the federal government to regulate telecommunications." Pet. App. 28a. The court further observed that "Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection." *Id.* at 29a. In these circumstances, it was appropriate to apply the well-established principle that "[e]ven if a state-imposed tariff furthers competition, as the commission's action seems to do, it may be preempted 'if it interferes with the *methods* by

which the federal statute was designed to reach [its] goal.'" *Ibid.* (emphasis in original) (citing, *inter alia*, *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992)).

The district court concluded that the Commission's order interferes with Congress's prescribed methods because it "requires [SBC] to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision." Pet. App. 29a. The court found that the Commission's order "interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff" and held that the "decision impos[ing] a tariff that the entrant may select unilaterally in lieu of the interconnection agreement process * * * is inconsistent with § 252 of the Telecommunications Act." *Id.* at 33a-34a.

The Seventh Circuit, in an opinion authored by Judge Posner and joined by Judge Easterbrook, affirmed. The court ruled that "[t]he district court was right to hold that the state's tariffing requirement is preempted." Pet. App. 5a.

The court relied on *Gade* and Judge Boggs' decision for the Sixth Circuit in *Verizon North Inc.* v. *Strand*, 309 F.3d 935 (6th Cir. 2002), for the principle that "[w]hether * * * the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure." Pet. App. 2a-3a. Applying this principle, the Seventh Circuit agreed with the district court that this state-imposed tariff "interfere[s] with the procedures established by the federal act." *Id.* at 6a. Among other things, "[t]he tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." *Id.* at 7a (citing 47 U.S.C. § 25[2](b)(3)). "At

the very least," the court concluded, "the tariff requirement complicates the contractual route by authorizing a parallel proceeding." *Id.* at 6a.

The court rejected petitioners' argument that the State Commission's bypass of the federal Section 252 process was permissible because it allegedly "promotes the procompetitive policy of the federal act." Pet. App. 7a. "[T]o identify the policy underlying a statute and then run with it is a dangerous method of interpretation; it is likely to run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place." *Ibid.* (citing, *inter alia*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)). The Seventh Circuit held that "[t]he negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." *Ibid.*

REASONS FOR DENYING THE PETITIONS

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THE DECISION OF ANY OTHER COURT OF APPEALS

The only two courts of appeals that have addressed the question presented in this case (the Sixth and Seventh Circuits) have both held that state-law tariffing requirements imposing interconnection obligations on an incumbent carrier that bypass the interconnection agreement process prescribed by Congress are preempted. There is no contrary authority. Because there is no circuit conflict and the decision below is plainly correct, the question presented in the petitions does not warrant this Court's review.

Earlier this year, this Court denied a state commission's petition for a writ of certiorari — raising the same question

and the same inter-circuit conflict argument asserted again by petitioners — in the Sixth Circuit case that the Seventh Circuit followed here. See 123 S. Ct. 1649 (Mar. 31, 2003). In *Verizon North*, Judge Boggs, writing for a unanimous Sixth Circuit panel, invalidated a state-law tariff requirement imposed on an incumbent LEC on the ground that the tariff order "ignores and bypasses the detailed process for interconnection set out by Congress" in the 1996 Act. 309 F.3d at 944. The Sixth Circuit noted that "[t]he central question in preemption analysis is always 'whether Congress intended that federal regulation supersede state law.'" *Id.* at 940 (quoting *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)). In the several savings clauses contained in the 1996 Act, "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [Act]." *Ibid.* (citing 47 U.S.C. § 261(b) (saving only state commission regulations that "are not inconsistent with the provisions of [the Act]") and *id.* § 261(c) (permitting additional state requirements "as long as the State's requirements are not inconsistent with [the Act]")).

Quoting its earlier decision in *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 923 (6th Cir.), cert. denied, 531 U.S. 957 (2000), the Sixth Circuit held that state commissions "administering the [1996 Act's] regulatory framework * * * must operate strictly within the confines of the statute." *Verizon North*, 309 F.3d at 940. The court observed that "state law provisions can be inconsistent with, and therefore preempted by, federal law even if the federal and state laws share a common goal" if the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *Ibid.* (citing, *inter alia*, *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)).

Applying these principles, the Sixth Circuit concluded that a state-law requirement to tariff a menu of unbundled network elements is preempted by federal law. In sections 251 and 252 of the Act, the Sixth Circuit explained,

"Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationships." *Verizon North*, 309 F.3d at 939. The court rejected the argument that this comprehensive federal procedure was just "one method" for implementing interconnection and access obligations and that states are "free to devise alternative methods under which competitors could acquire services and network elements from incumbents." *Id.* at 941. Rather, "the detailed procedural scheme — including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review — set out in § 252 is central to [the Act]," and should not "be evaded by state rule-making." *Ibid.* Because the Michigan commission's tariffing requirement "ignore[d] and bypasse[d] the detailed process for interconnection set out by Congress in the [1996 Act]," the Sixth Circuit invalidated the tariffing requirement as inconsistent with federal law. *Id.* at 944.

Relying on *Verizon North*, the Seventh Circuit reached the same conclusion here. As Judge Posner's opinion states, the Wisconsin commission "create[d] an alternative method by which a competitor can obtain interconnection rights" to access UNE-P and other network element combinations by "simply order[ing] Wisconsin Bell to file tariffs setting forth the price and other terms on which competitors such as WorldCom shall be entitled to interconnect with Wisconsin Bell's local telephone network." Pet. App. 2a. To evaluate the lawfulness of this state-law tariffing requirement, the Seventh Circuit applied the same legal standard that the Sixth Circuit utilized (*id.* at 2a-3a):

> Whether * * * the state's tariff-filing order is preempted by the provisions of the federal act creating the contractual route to interconnection depends on whether the state requirement interferes with the federal procedure. The [1996 Act] is

> explicit that a state commission's regulations concerning interconnection are not preempted "if such regulations are not inconsistent with the provisions of [the Act]." [Citing 47 U.S.C. § 261(b) and *Verizon North*.] But if they are inconsistent, they are preempted. A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law. [Citing *Gade*.]

Applying these principles, the court held that "the state's tariffing requirement is preempted" because it "interfere[s] with the procedures established by the federal act" by "enabl[ing] would-be entrants to bypass the federally ordained procedure." Pet. App. 5a-7a.

Petitioners attempt to manufacture a circuit conflict by pointing to two other decisions — a Sixth Circuit decision (*Michigan Bell* v. *MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348 (6th Cir. 2003)) decided shortly after *Verizon North* and an earlier Tenth Circuit decision (*U.S. West Comms., Inc.* v. *Sprint Comms. Co.*, 275 F.3d 1241 (10th Cir. 2002)). That argument is wholly unavailing. Neither decision addressed the question presented in this case and *Verizon North*.

To begin with, the panel in *Michigan Bell* did not purport to disagree with the governing circuit law set forth in *Verizon North*. To the contrary, the Sixth Circuit in *Michigan Bell* applied the same legal standards it had applied a mere four months earlier in *Verizon North* (and the same legal standards applied by the Seventh Circuit in this case). See 323 F.3d at 358-360. In applying those standards, the Sixth Circuit was careful to "distinguish" *Michigan Bell* from *Verizon North*. *Id.* at 360. The court acknowledged the comprehensive federal system for the implementation of the interconnection duties created by the Act, but observed that "the Act is silent with respect to *preexisting* state duties." *Id.*

at 359. The court then noted that in *Michigan Bell* "the tariffs preexisted the interconnection agreement," *id.* at 360, and held that "in this particular instance" the pre-existing tariff allowing MCI to "transmit resale orders" by fax may be enforced without "frustrat[ing] the purposes of the Act," *id.* at 361.[2]

The fact that no court has identified a conflict is hardly surprising in view of the unusual facts and narrow holding in *Michigan Bell*. Contrary to WorldCom's suggestion, *Michigan Bell*, unlike this case, did not involve a tariff that imposed substantive interconnection obligations on an incumbent carrier outside the section 252 agreement process. Rather, the case concerned merely the manner of "transmit[ting] resale orders." 323 F.3d at 361. At issue in *Michigan Bell* was a *pre-existing* state tariff under which competitors were able to order wholesale services for resale via fax. See PSCW Pet. 15 (acknowledging that *Michigan Bell*, unlike the instant case, "concerned a pre-Act tariff requirement"). The court merely upheld the Michigan Commission's determination, as a matter of state contract law, that the parties' section 252 interconnection agreement did not "preclude use of the state tariff." 323 F.3d at 357.

The court's holding that the "right of the Commission to enforce pre-existing tariffs as state regulation is consistent with the Act" (*id.* at 359) followed directly from its conclusion that the parties' section 252 interconnection agreement did not preclude reliance on such tariffs. As the

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[2] Even the dissenting judge in this case did not suggest that the majority opinion conflicted with *Michigan Bell*. He read *Michigan Bell* and *Verizon North* as involving applications of the same legal rule to different facts, Pet. App. 10a-11a, and concluded that the Seventh Circuit majority "appears to echo the errors of the Sixth Circuit, which has similarly justified preemption based on interference with § 252's procedures." *Id.* at 10a.

court explained, "*Assuming that the interconnection agreement did not preclude MCI's placing resale orders under Ameritech's tariff obligations*, the agreement and the Michigan tariff obligations can co-exist and work in concert to promote local service competition." *Id.* (emphasis added). The court concluded that "[a]llowing the state tariff *in this particular instance* to stand alongside the [interconnection] Agreement does not frustrate the purposes of the Act" (*id.* at 361, emphasis added) because it believed that it was simply giving effect to the parties' interconnection agreement as it was written. And, even if correct, that conclusion in no way conflicts with the holdings in this case and *Verizon North* that a state commission may not impose access and interconnection obligations on an incumbent LEC without regard to the detailed interconnection agreement procedures prescribed by Congress.

Petitioners' attempt to contrive a conflict with the Tenth Circuit fares no better. The Tenth Circuit's *Sprint* decision is the same decision that the Michigan Commission pointed to when it sought a writ of certiorari in the *Verizon North* case, presenting the same question, making the same arguments, and alleging the same "conflict." See Petition for a Writ of Certiorari, No. 02-1227 (available at 2003 WL 21699546). That petition was denied without dissent. 123 S. Ct. 1649 (Mar. 31, 2003). The Tenth Circuit's decision does not "conflict" with this case any more than it did with *Verizon North*.

While petitioners assert that *Sprint* "*implies* that tariff offerings are valid," PSCW Pet. 16 (emphasis added), it is obvious that the Tenth Circuit never addressed that issue. *Sprint* involved review of a Colorado commission arbitration under § 252 of the Act in which the Colorado commission approved interconnection agreement provisions allowing a competitor to purchase interconnection services on terms set by the agreement or on terms contained in the incumbent LEC's tariff. The parties to that case waived any argument

that it was impermissible for the State to require Qwest to tariff its interconnection and access offerings. Indeed, the Tenth Circuit twice noted that "[i]t is uncontroverted that Qwest is required by Colorado law to file tariffs disclosing the prices and terms for its services," 275 F.3d at 1245 n.4, and "MCI, Sprint and Qwest agree that, under Colorado law, a CLEC has the right to purchase services from an ILEC pursuant to the ILEC's tariffs without negotiating an interconnection agreement." *Id.* at 1250 n.10. No party questioned those requirements. Rather, the issue confronting the Tenth Circuit was, *assuming* that the state-law tariffing requirement was lawful, whether the 1996 Act prohibited a state commission from approving an interconnection agreement that allowed a competing LEC to "mix and match" terms and conditions from the interconnection agreement and the tariff. While the Tenth Circuit answered the latter question in the affirmative, it did not address, either explicitly or impliedly, the question resolved in this case and *Verizon North* — namely, whether a state commission may simply disregard the interconnection agreement process mandated by the Act in imposing interconnection and access obligations.

Finally, petitioners attempt to bolster their assertions by pointing to the FCC's *Texas Preemption Order* (*In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460 (1997), aff'd, 164 F.3d 49 (D.C. Cir. 1999)). See PSCW Pet. 16-17; WorldCom Pet. 22. The FCC's *Texas Preemption Order* is simply not on point.

The question before the FCC was whether a state-law requirement in Texas was preempted because it was "inconsistent with the [Act's] wholesale pricing standards," or "would have the effect of prohibiting carriers from reselling incumbent LEC services in violation of section 253(a) of the Act." *Texas Preemption Order* ¶ 131. The FCC concluded that the tariff was not invalid for either reason, but said *nothing* about the issue at stake in this case.

As the Sixth Circuit observed, the question whether competitors could acquire services from incumbents pursuant to state commission mandates imposed outside the Act's comprehensive federal system of negotiation and arbitration "is not discussed, relied upon, or even challenged in [the *Texas Preemption Order*]." *Verizon North*, 309 F.3d at 944 n.5.[3]

When the FCC later addressed the question presented here, it agreed with the Sixth and Seventh Circuits. In the *Virginia Preemption Order* (*In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 (2002)), the FCC held that where carriers "ask a state commission to set rates or resolve other issues relating to the interconnection agreement, a carrier *cannot use tariffs to circumvent* the Commission's determinations under section 252 or the right to federal court review under section 252(e)(6)." *Id.* ¶ 602 (emphasis added). Verizon (the incumbent) sought to "establish tariffs as the primary, central source for applicable prices," *id.* ¶ 594, and WorldCom opposed Verizon, arguing: "Congress chose not to rely on the historically tariffed regime with respect to interconnection and network element prices. Instead, it set up an alternative, detailed process, requiring negotiation, arbitration, approval, regulatory review, and federal court review, to ensure that the resulting agreement complies with federal law." *Id.* ¶ 592. The FCC agreed with WorldCom, holding that Verizon could not use tariffs to circumvent the section 252 process. *Id.* ¶¶ 599-602. Indeed, the FCC held that while "parties are certainly free to agree that services will be provided pursuant to tariffs," that is not the case "[w]here the parties fail to agree." *Id.* ¶ 602. As the district court below noted, "under the regime proposed in this case,

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[3] The FCC found it significant that parties challenging the Texas tariff were not precluded from "invok[ing] sections 251 and 252 of the Act." *Texas Preemption Order* ¶ 139. Here, by contrast, SBC *is* precluded from invoking those sections to the extent a competitor opts for the PSCW-imposed tariff.

the parties *do not agree* that services will be provided pursuant to a tariff." Pet. App. 32a.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS

A. The decision in this case is fully consistent with this Court's decisions construing the 1996 Act and well-established preemption principles. In *Iowa Utils. Bd.*, this Court stated that "the question * * * is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With respect to the matters addressed by the 1996 Act, it unquestionably has." 525 U.S. at 378 n.6. With respect to "the state commissions' participation in the administration of the new *federal* regime," it is federal law that "draw[s] the lines to which the [States] must hew." *Id.* (emphasis in original). One of the most significant "matters addressed by the 1996 Act" is the interconnection agreement process by which interconnection rights and obligations must be established. Attempts to bypass and undermine that process are invalid.

This Court repeatedly has observed that "[p]re-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade*, 505 U.S. at 98; see also *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("Even without an express provision for preemption, * * * state law is naturally preempted to the extent of any conflict with a federal statute."). The doctrine of implied preemption applies where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). And "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by

examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Further, it is well settled that federal law preempts not only state law that conflicts with federal substantive standards, but also trumps state action that "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Gade*, 505 U.S. at 103 (emphasis added). As this Court held, because "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," federal preemption extends to "'specially designed procedures * * * to obtain uniform application of [Congress's] substantive rules.'" *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971) (quoting in part *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491 (1953)). "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means" (*Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995)), and courts and administrative agencies alike "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218, 231 n.4 (1994). In short, where "Congress plainly meant to do more than simply to alter the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy," state action that conflicts with or undermines Congress's chosen "technique of administration" is preempted. *Amalgamated*, 403 U.S. at 287-288.

State commission action that attempts to bypass the federally-mandated procedures for imposing interconnection and access requirements run afoul of these well-established principles. In the 1996 Act, Congress not only created new substantive obligations, but created detailed procedural mechanisms by which those obligations are to be

implemented. Among other things, the Act requires an initial period of negotiation (47 U.S.C. § 252(a)(1)); permits incumbent LECs to "negotiate and enter into a binding agreement * * * without regard to" the substantive requirements set forth in sections 251(b)-(c) (*id.*); establishes a precise timetable and specific standards for arbitrating any disputed issues (*id.* § 252(b)-(d)); places restrictions on the issues that state commissions may consider in arbitrating disputed issues (*id.* § 252(b)(4)(A)); imposes specific time limits on the state commission's decision (*id.* § 252(b)(4)(C), (e)(4)); and provides for exclusive federal district court review of state commission actions relating to interconnection agreements (*id.* § 252(e)(4) and (6)).

Section 252 unmistakably establishes a comprehensive procedure for implementing federal telecommunications policy through interconnection agreements. See *Verizon North*, 309 F.3d at 939 ("Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationship"). In this self-contained federal framework — consisting of negotiation, arbitration, and approval, all leading up to federal judicial review — Congress clearly mandated "the methods by which the federal statute [is] designed to reach [its] goals." *Gade*, 505 U.S. at 103. As Congress intended, these "specially designed procedures" (*Amalgamated*, 403 U.S. at 287) result in detailed section 252 agreements that constitute the "binding" statement of the parties' respective interconnection rights and obligations. 47 U.S.C. § 252(a)(1).

B. Petitioners argue that Congress has not explicitly preempted state tariffing requirements, and point out that the Act contains several "savings clauses." WorldCom Pet. 23-24; PSCW Pet. 19-20. But this Court has warned against "plac[ing] more weight on the savings clauses than those provisions can bear, either from a textual standpoint or from

a consideration of the whole federal regulatory scheme." *United States* v. *Locke*, 529 U.S. 89, 105 (2000). A savings clause "does not bar the ordinary working of conflict pre-emption principles," and courts must "decline[] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 869-870.

In fact, in the savings clauses of the 1996 Act, Congress preserved state regulation *only to the extent that it is not inconsistent with the federal Act.* 47 U.S.C. §§ 251(d)(3), 261(b), 261(c); Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (1996). As Judge Boggs noted, "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the [Act]." *Verizon North*, 309 F.3d at 944. For instance, petitioners rely on section 251(d)(3) (*see* WorldCom Pet. 23; PSCW Pet. 21), but that clause permits only state rules that are *both* "consistent with the requirements of this section" *and* "do[] not substantially prevent implementation of the requirements of this section *and the purposes of this part.*" (Emphasis added.) One of the primary "purposes of this part" (which includes sections 251 through 261) is the establishment of a comprehensive federal mechanism for implementing interconnection and access rights and obligations through interconnection agreements. The PSCW attempted to jettison that process with respect to one of the most hotly-disputed inter-connection and access issues confronting carriers – the terms and conditions of access to UNE-P.

Similarly, section 261(b) permits the enforcement of state regulation "not inconsistent with the provisions of this part," and section 261(c) allows state regulation that is "necessary to further competition * * * as long as the State's require-ments are not inconsistent with this part or the [FCC's] regulations to implement this part." As the FCC recently stated in its *Triennial Review Order*, "[s]ections 261(b) and (c) generally preserve state authority to take action pursuant

to state law, *provided that such action is consistent with the Act and our federal framework.*" *Triennial Review Order* ¶ 180 (emphasis added).[4] And section 251(d)(3) permits additional state regulation "only to the extent that state laws or regulations do not conflict with or frustrate the Act and its purposes or substantially prevent the federal *implementation* regime." *Id.* ¶ 186 (emphasis added).

Petitioners also invoke section 601(c) of the Act, an uncodified "savings clause" that provides that the Act "shall not be construed to modify, impair, or supersede" state law "unless expressly so provided." Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143. In the other savings clauses, of course, Congress made clear that the states are forbidden from regulating in a manner inconsistent with the Act, and "expressly so provided." Section 601(c) adds nothing to the ordinary preemption principles at issue here. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("neither an express pre-emption provision nor a saving clause 'bars the ordinary working of conflict pre-emption principles'"); *Geier*, 529 U.S. at 869 ("the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles") (emphasis in original).

Petitioners further assert that the Seventh Circuit ignored the "presumption" against preemption where a State acts "within the boundaries of traditional state regulatory authority." WorldCom Pet. 27; see also PSCW Pet. 19. But petitioners ignore this Court's admonition that "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States."

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003), available at 2003 WL 22175730 ("*Triennial Review Order*").

Iowa Utils. Bd., 525 U.S. at 379 n.6. Accord *Bell Atlantic-Pennsylvania*, 271 F.3d at 511. Thus, with respect to the "matters addressed" by the Act, Congress "has precluded all other regulation [of telecommunications] except on its terms" — and certainly has precluded conflicting requirements. *Illinois Bell*, 222 F.3d at 343. Accord *GTE North*, 209 F.3d at 923 ("in administering the [Act's] regulatory framework," state commissions "must operate strictly within the confines of the statute"). The implementation of interconnection and access obligations is one of the most significant "matters addressed by the 1996 Act," and thus state regulators are not entitled to any presumption against preemption with respect to such matters. *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. See *AT&T Communications* v. *BellSouth Telecommunications, Inc.*, 238 F.3d 636, 641 (5th Cir. 2001) ("the Court in *Iowa Utilities*, in answer to arguments of the dissenters relying on the presumption against preemption of state regulatory power, responded that the 1996 Act clearly manifested Congress's intent to supplant traditional state police power regulation of local telecommunications competition"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946-947 (8th Cir. 2000) ("The new regime for regulating competition in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law" (citing *Iowa Utils. Bd.*, 525 U.S. at 379 n.6)).

Similarly, the PSCW's assertion that the principle of *Gade* (that state action is preempted if it "interferes with the methods by which the federal statute was designed to reach [its] goal," 505 U.S. at 103) is inapplicable here because Congress gave state commissions "a 'key role in the regulatory scheme'" is plainly wrong. See PSCW Pet. 22. That "key role" consists of arbitrating, approving, and overseeing interconnection agreements — the very role the PSCW attempted to sidestep with its tariffing requirement. While state commissions may enforce consistent state

regulation when undertaking that role in the interconnection agreement process, this does not mean they can bypass that process altogether. Further, the FCC applied *Gade* in the very FCC decision that petitioners attempt to rely on here — the *Texas Preemption Order*. *Texas Preemption Order* ¶ 50.[5]

C. The PSCW also invokes section 252(f) of the Act, which allows an incumbent to submit for state commission approval a generic "statement of generally available terms ("SGAT"), and argues that that section "clearly contemplates the co-existence of tariffs and interconnection agreements." PSCW Pet. 21-22. It does nothing of the sort.

To begin with, section 252(f)(1) states that an incumbent "*may* prepare and file" an SGAT. 47 U.S.C. § 252(f)(1) (emphasis added). Nothing in the Act *requires* an incumbent to file an SGAT or allows a state commission to force it to do so. Moreover, even if section 252(f) were an alternative *federal statutory* vehicle for implementing the local competition provisions of the 1996 Act (which it is not), that would provide no support for the proposition that a *state commission* can use an *extra-statutory state method* of implementing those provisions. Indeed, as the Sixth Circuit correctly held in *Verizon North*, "§ 252(f) actually illustrates why [a] tariff procedure is inconsistent with, and therefore preempted by, the Act." 309 F.3d at 943. In particular (*ibid.*),

> the same subsections of § 252 provide the same carefully-designed review process for a § 252(f) statement as they do for an interconnection

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[5] Petitioners' assertion that the Seventh Circuit somehow erred in accepting a "facial" challenge to the PSCW's order "irrespective of the terms of any interconnection agreement" (WorldCom Pet. 26-27) is inexplicable. There is no valid application of the PSCW's order because the PSCW itself attempted to impose interconnection and access obligations irrespective of the interconnection agreement procedures prescribed by Congress.

> agreement – the statement is to be presented to the relevant state commission for approval, the FCC can step in to approve the statement if the state commission does not act, and the state commission's actions are subject to federal court review. * * * [The] tariff procedure bypasses all of this procedure.

Thus, "nothing in the language of § 252(f) suggests that it provides an alternative route around the interconnection agreement process for competitors of Bell companies that have filed § 252(f) statements." *Verizon North*, 309 F.3d at 942-943.[6]

In any event, section 252(f) plainly is *not* a method of implementing the local competition provisions of the Act. Rather, as the Seventh and D.C. Circuits have explained, a section 252(f) SGAT is simply a vehicle that may be available under limited circumstances to at Bell Operating Company ("BOC") to facilitate its application to the FCC for approval to provide interLATA *long distance service* to the BOC's own customers. *Illinois Bell*, 222 F.3d at 329-330; *AT&T Corp.* v. *FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000). In other words, an SGAT is the procedure by which a BOC demonstrates how it *would offer to provide* access and interconnection *if* any new entrant were to make a request to commence negotiation of an agreement under section 252.

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[6] Petitioners also quibble with Judge Posner's observation that the commission has undermined the bargaining process by forcing SBC to state its "reservation price." See WorldCom Pet. 24-25. That is a red herring. The fundamental issue here is whether state requirements that "interfere with the procedures established by the federal act" by "enabl[ing] would-be entrants to bypass the federally ordained procedure" are preempted. Pet. App. 6a-7a. Both the Seventh and Sixth Circuits answered that question in the affirmative and no other court has disagreed.

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT PREVENT STATES FROM IMPLEMENTING LOCAL POLICIES

Petitioners suggest that the Seventh Circuit's decision is inconsistent with "Congress' invitation to the states to participate in the Act's cooperative federalism," which includes "the opportunity for state commissions to engage in substantive policy making under state law to promote competition." PSCW Pet. 23-24. State commissions *are in fact* participating at "Congress' invitation," but they must play by Congress's rules. Cooperative federalism means, among other things, that states cooperate and work within the framework and "specially designed procedures" fashioned by Congress. See *Amalgamated*, 403 U.S. at 287.

There is no merit to the PSCW's suggestion that without the ability to impose tariffed interconnection and access obligations by fiat, state commissions are powerless to effectuate local policies. Congress not only protected the ability of state commissions to engage in substantive policy-making, but, to the extent that policy-making concerns the prices, terms and conditions of incumbent-to-competitor interconnection and access, expressly provided the "means" by which state commissions can (and must) implement those policies — in review and approval of interconnection agreements. 47 U.S.C. § 252(e)(3). The Seventh Circuit recently confirmed the power of the States to promulgate substantive rules that are consistent with section 252 procedures where "federal law leaves a gap-filling role for the states." *AT&T Communications of Illinois, Inc.* v. *Illinois Bell Tel. Co.*, __ F.3d __, 2003 WL 22533675, at *6 (7th Cir. Nov. 10, 2003). State commissions are by no means powerless if denied the ability to evade the interconnection agreement procedures created by Congress: *every* interconnection agreement must be reviewed and approved by a State commission. *Id.* § 252(e)(1) ("Any interconnection agreement adopted by negotiation or

arbitration shall be submitted for approval to the State commission"). Even agreements adopted by negotiation can be rejected by a state commission if it concludes that the agreement "discriminates" against other carriers or that "the implementation of such agreement * * * is not consistent with the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A)(i)-(ii).[7]

The only alleged "benefit" of imposing access and interconnection obligations via tariffs rather than through the procedures mandated by Congress that petitioners are able articulate is avoidance of the prospect of "delay" in the formation of an interconnection agreement. Tariffs, petitioners assert, allow a competitor to "avoid[] most § 252 negotiation expenses." PSCW Pet. 27. But Congress already created a procedure to allow new entrants to secure a contract quickly and efficiently. Section 252(i) of the Act allows competitors to opt in to the terms and conditions of an agreement already approved by the state commission, so that

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[7] This case bears no resemblance to *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), relied on by petitioners. *Ours Garage* involved provisions of the Interstate Carrier Act that expressly preempted state *economic* regulation by both "State[s]" and their "political subdivision[s]," while expressly preserving the power of "State[s]" to exercise safety regulatory authority. *Id.* at 428. The issue was whether States' political subdivisions were preempted from exercising safety regulatory authority. The Court held they were not because there was no clear statement from Congress that it intended to override the States' traditional prerogative to delegate authority to their political subdivisions — the "ordinary method by which States enforce such rules." *Id.* at 428, 436. This case does not involve any dispute over the power of the states to delegate regulatory authority. Further, under the 1996 Act, Congress did not preserve state tariffing requirements. And it preserved state regulation only to the extent it is consistent with the Act. Congress specified the methods that state commissions can use to promote competition — interconnection agreement arbitration, review, and approval.

a carrier need not engage in "de novo" negotiations. Further, the 1996 Act requires all carriers, including incumbents, to "negotiate in good faith" (47 U.S.C. § 251(c)(1)), and both the FCC and state commission are empowered to resolve complaints (and impose penalties) regarding violations of that duty — including "actions that are intended to delay negotiations." *First Report and Order*, 11 F.C.C.R. 15,499 ¶¶ 143, 154 (1996).

The present case disproves petitioners' argument that state-imposed tariffs reduce the "time delays" associated with the section 252 process. The Wisconsin proceeding at issue was instituted on December 15, 1999. Pet. App. 39a. The PSCW issued its Final Decision on September 25, 2001, *more than 21 months later*, noting that "[t]his proceeding has been complex and time-consuming, and more is yet to come." *Id.* at 38a-39a. On November 14, 2001, nearly *23 months* after the proceeding was initiated, the PSCW issued its Order Denying Rehearing. *Id.* at 76a. Under the procedures mandated by Congress, by contrast, state commissions are *required* to complete any arbitration "not later than 9 months after the date on which" the competitor first requested to negotiate the interconnection agreement. 47 U.S.C. § 252(b)(4)(C). Because no party can request arbitration until the 135th day after the negotiation request (*id.* § 252(b)(1)), the *longest* time a state commission could have to complete an arbitration is approximately *4½ months*.

Moreover, the FCC has made clear that concerns about "lag[s]" in negotiating interconnection agreements do not justify "interfering with the contract process." *Triennial Review Order* ¶ 701. In the *Triennial Review* proceeding, several carriers urged the FCC to "unilaterally change all interconnection agreements" to reflect the new FCC rules established in that proceeding, "to avoid any delay associated with renegotiation of contract provisions." *Ibid.* The FCC refused, holding that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of

section 251 and section 252." *Ibid.* In accordance with Congress's desire to create a de-regulatory framework for local telecommunications competition based on private negotiation, the FCC held that "individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." *Id.* ¶ 700. The tariff order at issue here impermissibly denies incumbent carriers this opportunity.

Petitioners baldly assert that "[t]he Commission's tariff requirement benefits a competitor without harming the incumbent" (PSCW Pet. 26), pointing to the dissent's assertion in this case that SBC's pricing is already "quasi-public" and thus SBC is not harmed by disclosure of its "reservation price" in a tariff. But that is far from the only harm the tariffing requirement inflicts.

The tariff order here creates an unfair and unbalanced situation in which competing LECs have full discretion to use tariffs in place of an interconnection agreement, or negotiate an agreement, or pick and choose the parties' rights and obligations from each. But incumbent LECs would always have a duty to negotiate binding section 252 contracts and could not simply refer competing LECs to tariffs as a complete displacement of all or any part of the interconnection agreement process. Congress did grant "'most promiscuous rights' * * * to competing carriers vis-à-vis the incumbents," *Iowa Utils. Bd.*, 525 U.S. at 397, which are "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Comms., Inc.* v. *FCC*, 535 U.S. 467, 489 (2002). But the system designed by Congress is not without countervailing checks and balances. As Judge Posner explained, Congress did not

allow competing carriers to avoid the same interconnection agreement process to which incumbents must adhere.

Once the negotiation process is triggered, an incumbent like SBC has both duties and rights under the Act's local competition provisions. Among other things, an incumbent LEC has a "right to fulfill its duty [to interconnect] by negotiating the terms of such agreements on its own, without regard to the 1996 Act's substantive standards" and "to enforce its right to a negotiated, binding interconnection agreement" before the state commission and the federal courts. *Verizon Md., Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 551 n.3, 555 (D. Md. 2002). Once negotiation is triggered, an incumbent also has a right to invoke state commission arbitration of any disputed issues. 47 U.S.C. § 252(b)(1). In short, in sections 251 and 252 of the Act, Congress established a balanced approach based on its "clear preference" for negotiated interconnection agreements. *Bell Atlantic-Pennsylvania*, 271 F.3d at 500. Tariffing requirements of the kind at issue here turn that into a one-way street, allowing state commissions — at the behest of competing LECs — to impose new and even conflicting interconnection obligations outside Congress's prescribed procedures and without the section 252(e)(6) review contemplated by Congress.

While WorldCom avers that the Seventh Circuit's decision "directly and substantially impairs the ability of MCI and other competing carriers to operate their business" (WorldCom Pet. 28), nothing in that decision prevents carriers from doing exactly what they have done for the last seven years: negotiate and arbitrate interconnection agreements with incumbents.[8] Incumbent and competing

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[8] While WorldCom (at 30) expresses "confusion about the enforceability of * * * freely-negotiated [interconnection agreement] provisions" that allow a competitor access to tariffs, that is an issue of contract interpretation for the state commissions.

LECs have entered into thousands of interconnection agreements. Under those agreements competing carriers have managed to steadily increase their market share, adding several *million* new lines each year. See FCC Wireline Competition Bureau, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 12, 2002, Table 1 (June 2003) (available at http://www.fcc.gov).

The Commission's suggestion that state-imposed tariffs are preempted only if they operate to "preclude[] or create[] a *complete* bypass of § 252 procedures" (PSCW Pet. 27) is erroneous. The Commission believes that it is permissible to side-step Congress's procedural design and impose "core tariff" terms governing the most important aspects of carrier-to-carrier relations (like access to UNE-P) by fiat as long as a state commission allows the incumbent LEC to negotiate *some* "collateral matters" of the carrier-to-carrier relationship (*i.e.*, when and where the bills are to be sent). *Ibid.* But even if the Commission's tariffing order only bypassed Congress's procedures with respect to the core rights and duties created by sections 251 and 252 (the terms and conditions governing access to network elements — which WorldCom acknowledges is "'[f]oremost' among the[] obligations" created by the Act, see WorldCom Pet. 5), while leaving some administrative issues for negotiation, that would not make it any less inconsistent with the federal regime. In any event, the Commission's tariff clearly effects a "complete bypass of § 252 procedures" with respect to the core interconnection matters addressed by that tariff, wiping out the good faith negotiation, arbitration, and review process mandated by Congress.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

WORLDCOM, INC.,
Petitioner,

v.

WISCONSIN BELL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent's brief fails to grapple with the central point presented in these Petitions. The Seventh Circuit held that the Telecommunications Act of 1996 prevents States from exercising their authority to require incumbent local telephone carriers such as Respondent to make services available to competing carriers via tariffs – an authority state commissions have exercised both before and since the passage of the Act. The decision thus imposes a severe restriction on state sovereignty. Moreover, it does so in the absence of any provision of the 1996 Act preempting such pro-competitive state tariffs expressly, and in the face of numerous provisions of the Act that explicitly *preserve* state authority and make clear Congress' intention that States play a critical role in implementing the Act's interconnection provisions. As MCI's Petition, the Petition filed by the Wisconsin Commission, and the amicus brief on behalf of the National Association of Regulatory Utility Commissioners ("NARUC") all demonstrate, the impact of the Seventh Circuit's encroachment on state sovereignty is not just theoretical. The Seventh Circuit has eliminated an important practical tool that States have used for more than a decade in efforts to open local telephone markets to competition.

Largely ignoring these critical points, Respondent devotes the bulk of its brief to an excruciatingly detailed parsing of numerous decisions of the courts of appeals and the FCC in an effort to show that there is no conflict among the Circuits that merits this Court's review. That effort is to no avail, as there is little doubt that a direct conflict exists: the tariff upheld by the Sixth Circuit in *Michigan Bell Telephone Co. v. MCImetro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003), would plainly be invalid under the Seventh Circuit's decision below. In all events,

Respondent's laborious effort to rationalize the numerous decisions in this area merely confirms the widespread confusion among the courts of appeals and regulatory authorities regarding the extent to which the 1996 Act impliedly preempts States from using tariffs in order to further local competition. In view of the issue's legal and practical significance, that widespread confusion is sufficient to warrant this Court's review.

1. MCI, the Wisconsin Commission, and NARUC all urge this Court to grant review because the Seventh Circuit's decision deprives state regulators of an important tool for overcoming incumbents' efforts to delay the onset of competition in any way possible. In the absence of tariffs, incumbents can force new entrants to resort to the nine-month process of negotiation and arbitration whenever an interconnection request differs slightly from a pre-existing contract, or whenever an unanticipated legal or practical problem arises requiring amendment to an existing interconnection agreement. That delay severely undermines the competitive prospects of new entrants.

Respondent's principal response is to suggest that the Act itself adequately addresses any concerns about undue delay. *See* Opp. Br. at 23-25. But in the real world in which Petitioners operate, no interconnection agreement could possibly set forth the incumbent's obligations with sufficient clarity and detail to foreclose every conceivable ground for delay. Nor could an agreement adequately anticipate every change in the marketplace or legal landscape. State commissions have thus appropriately established tariffs to fill in gaps and ensure that the rules of the game can be modified rapidly so that competition can take hold. State tariffs have been used, for example, to address an

incumbent's refusal to accept orders from new entrants by facsimile, *see Michigan Bell*, 323 F.3d at 353-54; to create a "safety net" by specifying a minimum level of discount for resold services, *see In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460 ¶ 132 (1997) ("*Texas Preemption Order*"); and (as here) to override an incumbent's imposition of terms and conditions that the state commission determined were be "unreasonable" and constituted "unacceptable overreaching." Pet. App. 57a-58a; *see also* NARUC Br. at 4 nn.6-7 (citing tariffs from Indiana and Oregon); *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) (addressing Michigan tariffs), *cert. denied*, 123 S. Ct. 1649 (2003). That so many state commissions have felt the need to resort to tariffs to prevent delay refutes Respondent's assertions.

Respondent also seeks to divert attention from the severe practical consequences of the decision below by asserting that interconnection agreements have allowed competing carriers to "steadily increase their market share." Opp. Br. at 27. But today, nearly eight years after the passage of the 1996 Act, incumbents maintain market shares that are nearly 90% nationwide. Indeed, it is precisely the *lack* of success achieved by new entrants in seeking to overcome the intransigence of incumbents such as Respondent that has spurred Wisconsin and other States to use tariffs.

Respondent next suggests that, whatever the practical impediments to competition, state law tariffs are preempted because federal law "trumps state action that 'interferes with the *methods* by which the federal statute was designed to reach its goal,'" Opp. Br. at 15 (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)) (emphasis and alteration in Respondent's brief), and because States are bound "not only by the ultimate purposes

Congress has selected, but by the means it has deemed appropriate." Opp. Br. at 15. Whatever the validity of those principles as a general matter, they have no application here. Congress disclaimed *expressly* any intention to limit the ability of States to supplement the interconnection provisions of the 1996 Act with pro-competitive state law requirements. Indeed, § 251(d)(3) expressly preserves "any regulation, order, or policy of a State commission that . . . *establishes access and interconnection obligations* of local exchange carriers," 47 U.S.C. § 251(d)(3)(A) (emphasis added), a category that indisputably includes tariffs such as the one Wisconsin imposed here.

Respondent tries half-heartedly to reconcile the express preservation of state tariffs in § 251(d)(3) with its implied preemption argument. Respondent observes, for example, that § 251(d)(3) preserves only those state tariffs that "do not substantially prevent implementation of this section *and the purposes of this part*," Opp. Br. at 17 (emphasis in original), and argues that "[o]ne of the primary 'purposes of this part'" is "the establishment of a comprehensive federal mechanism for implementing interconnection and access rights and obligations through interconnection agreements." *Id.*

But that argument is doubly mistaken. First, it confuses the "purposes of this part" – the opening of local markets to competition – with the method Congress chose to accomplish those purposes, namely the interconnection agreement process. The interconnection process is a means to an end, not an end in itself.

Second, under the Seventh Circuit's decision and Respondent's argument, *any* state requirement that "establishes access and interconnection obligations of local exchange carriers" is inconsistent with the negotiation and

arbitration procedures established by the Act. *Cf.* Pet. App. 16a (Cudahy, J., dissenting) ("[T]he only issue is whether there is any set of facts under which the [Commission] can require tariffing."). The effect of Respondent's argument (and the decision below) is thus to read § 251(d)(3) out of the Act.

The dramatic incursion on state authority accomplished by the Seventh Circuit and defended here by Respondent is particularly inappropriate given Congress's intent in the 1996 Act to build on, not displace, state efforts to open local markets to competition. *See, e.g.*, S. Rep. No. 104-23 at 5 (1995) (noting with approval state efforts to "open the local networks of telephone companies"). The Act is rife with expressions of congressional intent to *preserve* pro-competitive state laws. *See, e.g.*, 47 U.S.C. § 251(d)(3); *id.* § 261(c); *id.* § 252(e)(3); Act § 601(c), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152). Moreover, the Act's express preemption provisions eliminate only "barriers to entry." *See* 47 U.S.C. § 253(a) (granting authority to preempt state requirements that "prohibit or have the effect of prohibiting" competition).[1] To read the Act, as Respondent does, as seeking to undo and prohibit state

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[1] Nothing in *United States v. Locke*, 529 U.S. 89 (2000), or *Geier v. American Honda Motor Co.*, 529 U.S. 873 (2000), is to the contrary. Opp. Br. at 16-17. In *Locke*, the Court held that a savings clause in one part of a statute should not be construed to "save" state laws relating to other parts of the statute. 529 U.S. at 105. Here, of course, the savings clauses are in the very sections of the statute (sections 251 and 252) that create the interconnection obligations. In *Geier*, the Court relied heavily on the views of the implementing agency to conclude that the state law at issue was preempted. 529 U.S. at 874-75. Here, in contrast, the implementing agency (the FCC) has refused to preempt state tariffs like the one at issue here. *See supra* pp. 8-9.

efforts to open local markets to competition is to step through the looking glass.

2. Nothing in Respondent's brief can mask the direct conflict and widespread confusion among the courts of appeals and regulatory bodies regarding the authority of state commissions to impose tariffs to speed the process of opening local telephone markets to competition.

The Seventh Circuit held that a state tariff "*has* to interfere with the procedures established by the federal act," Pet. App. at 6a (emphasis in original), because it "places a thumb on the negotiating scales," *id.*; "complicates the contractual route" envisioned by the Act, *id.*; "shortcircuits negotiations, making hash" of the Act's timing provisions, *id.* at 7a; and deprives incumbents of "a degree of protection" that the Act otherwise provides, *id.* As the majority opinion and the dissent agreed, the panel decision adjudicating Respondent's facial challenge unambiguously eliminates Wisconsin's authority to tariff *any* interconnection obligations. *See* Pet. App. 2a ("The question presented by this appeal is whether a state may create an alternative method by which a competitor may obtain interconnection rights."); *id.* at 16a ("[T]he only issue is whether there is any set of facts under which the [Wisconsin Commission] can require tariffing."). Under the Seventh Circuit's decision, therefore, neither the tariff upheld by the Sixth Circuit in *Michigan Bell* – which entitled incumbents to fax interconnection orders – nor the tariff upheld by the FCC in the *Texas Preemption Order* – which established a minimum discount to be applied to services ordered by new entrants for resale – could survive. The conflict is thus square and undeniable.

Respondent seeks to cloud this conflict by citing to the Sixth Circuit's decision in *Verizon North, Inc. v Strand*. *See* Opp. Br. at 7-8. But the Seventh Circuit has foreclosed Wisconsin's authority to add interconnection obligations under *any* circumstances. The critical point is thus that the Sixth Circuit allows tariffs in *some* circumstances – as *Michigan Bell* makes clear that it does – including circumstances such as the ones presented here. That the Sixth Circuit forecloses tariffs in other circumstances (as in *Verizon North*) is beside the point.[2]

Moreover, by its own terms, *Verizon North*'s preemption holding is limited to state-law tariffing obligations that allow competing carriers to bypass the "entire interconnection process." *Verizon North*, 309 F.3d at 943. The Sixth Circuit made clear in *Michigan Bell* that *Verizon North* is inapplicable in situations in which the competing carrier and the incumbent have already entered into an interconnection agreement, and when the agreement itself does not preclude the use of state-law tariffs. 323 F.3d at 360. Here, the Wisconsin Commission specifically (and correctly) found that the tariffs at issue in this case did "not

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[2] Nor is it relevant that *Michigan Bell* involved only the "manner of submitting" orders for certain services. Opp. Br. at 10. The method by which a competing carrier orders interconnection services from an incumbent is a "substantive interconnection obligation" that directly establishes the terms and conditions of the competing carrier's interconnection with the incumbent carrier. Indeed, before the Sixth Circuit, Respondent's subsidiary contended that the tariff at issue in *Michigan Bell* imposed "an interconnection obligation that is inconsistent with the terms of a binding section 252 agreement." Brief of Appellee Michigan Bell Tel. Co. at 23, filed in *Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348 (6th Cir. 2003). *Michigan Bell* is simply irreconcilable with the Seventh Circuit's decision in this case.

create a complete regime" of interconnection that would allow carriers to "bypass" the § 252 process and provide services without ever entering into an interconnection agreement. Pet. App. 57a. Indeed, MCI went through the Act's interconnection agreement process and is a party to an existing interconnection agreement with Respondent, *see* Pet. at 29, and nothing in that agreement precludes reliance on state tariffs. *Verizon North* is thus a red herring.

Nor is Respondent correct that the petition for a writ of certiorari in *Verizon North* raised "the same question and the same inter-circuit conflict argument asserted again by petitioners." Opp. Br. at 6-7, 11. The Sixth Circuit issued its decision in *Michigan Bell*, which clarified the scope of its decision in *Verizon North*, *before* the petition for certiorari was denied in *Verizon North*. Thus, when this Court resolved the petition in *Verizon North*, no Circuit had yet held that States were absolutely foreclosed from using tariffs. It was not until the Seventh Circuit issued its decision in this case that the split among the Circuits was created.

Respondent similarly seeks to muddy the waters with respect to the FCC's *Texas Preemption Order*, 13 F.C.C.R. 3460. The Texas provision at issue allowed new entrants to purchase an incumbent's local exchange service at a five percent discount from the retail rate specified in the incumbent's local tariff. *Texas Preemption Order* ¶ 15. The Texas Commission thus permitted new entrants to order directly from a tariff, rather than going through negotiation and arbitration process. The FCC upheld the Texas tariff, *id.* ¶ 139, while it is plain that the Seventh Circuit would have invalidated it.

Respondent seeks to distinguish the *Texas Preemption Order* on the ground that Respondent here is "precluded

from invoking [Sections 251 and 252] to the extent a competitor opts for the [state]-imposed tariff." Opp. Br. at 13 n.3. But the same was true in Texas – when a new entrant purchased services off the state tariff, the incumbent could not "invoke" the Act's arbitration and negotiation provisions.

Nor does the FCC's decision in *In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 (2002) ("*Virginia Arbitration Order*") change the analysis. *See* Opp. Br. at 13. In that instance, it was the *incumbent* seeking the right to file rates in a tariff that would apply immediately to new entrants. MCI (then-WorldCom) argued to the FCC that such a procedure was contrary to the Act because "the tariffed rates filed with the [state] commission might exceed the cost-based rates that the Act requires." *Virginia Arbitration Order* ¶ 592. The FCC refused to allow the tariff-filing procedure. The fact that the FCC refused to allow a tariff that was anti-competitive – *i.e.*, a tariff that allowed an incumbent to set unilaterally the terms of competition – says nothing about the FCC's view of tariffs, like the one at issue here, that are indisputably *pro-competitive*. As for those tariffs, the analysis in the *Texas Preemption Order* is controlling.[3]

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[3] Respondent's attempt to square the decision with *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), fares no better. Respondent's assertion that it was "uncontroverted" that Colorado law required the incumbent to file tariffs, Opp. Br. at 11 is no distinction – it is equally "uncontroverted" in this case that Wisconsin law requires Respondent to tariff the services at issue. It is equally plain that the Tenth Circuit addressed the critical issue. After analyzing one specific provision of the Act, the court stated that it was also addressing "whether the tariff opt-in provision violates any other portions of [the Act]." 275 F.3d at 1249. The district court in that case, just like the Seventh Circuit here, had held that allowing a competing carrier "to use a tariff to supplement or supplant any term,

In the end, Respondent's detailed discussion about the divergent approaches taken by courts (both within and across Circuits) and regulatory agencies merely confirms the need for this Court's review. State regulatory authorities have asserted their continuing authority to impose tariffs where appropriate to facilitate competition, *see, e.g.*, NARUC Br. at 4 n.7, and the federal courts and the FCC have upheld many of these tariffs, including tariffs that are materially indistinguishable from the tariff at issue here. The Seventh Circuit, in contrast, has foreclosed Wisconsin (and the other States in the Seventh Circuit) from supplementing interconnection agreements with state tariffs under any circumstances. This Court should step in to provide much-needed clarity regarding the scope of state authority to further the Act's pro-competitive goals by using state tariffs.

CONCLUSION

The petition for a writ of certiorari should be granted.

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condition, or price that is covered by the agreement . . . would eviscerate the provisions of [the Act]." *Id.* at 1249-50 (quotation omitted; alteration in original). The Tenth Circuit squarely rejected that reasoning, holding that the tariffing provision "does not diminish the negotiation process, but instead ensures that a [competing carrier] will be able to obtain the most favorable prices and terms available, thereby allowing it to remain competitive in the local marketplace." *Id.* at 1250.

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